Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 26 NOVEMBER 4, 1992 No. 45

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 92–100)

APPROVAL OF TESTING JSI AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of JSI as a commercial gauger.

SUMMARY: JSI of Houston, Texas applied to Customs for approval to gauge imported petroleum, petroleum products, organic chemicals and vegetable and animal oils under Part 151.13 of the Customs Regulations (19 CFR 151.13). Customs has determined that JSI meets all of the requirements for approval as a commercial gauger.

Therefore, in accordance with Part 151.13(f) of the Customs Regulations JSI, 15102 Stonewick, Houston, Texas 77068 is approved to gauge the products named above in all Customs districts.

EFFECTIVE DATE: October 8, 1992.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, D.C. 20229 (202–927–1060).

Dated: October 15, 1992.

J.E. HARRELL,
Acting Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, October 22, 1992 (57 FR 48267)]

U.S. Customs Service

General Notice

CURRENT IRS INTEREST RATE USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation and interest.

SUMMARY: This notice advises the public of the interest rates for overpayments and underpayments of Customs duties. The rates are 6 percent for overpayments and 7 percent for underpayments for the quarter beginning October 1, 1992. This notice is being published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: October 1, 1992.

FOR FURTHER INFORMATION CONTACT: John V. Accetturo, Revenue Branch, National Finance Center, (317) 298–1308.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less and are to fluctuate quarterly. The rates are determined during the first month of a calendar quarter and become effective for the following quarter.

The rates of interest for the period of October 1, 1992–December 31, 1992, are 6 percent for overpayments and 7 percent for underpayments.

These rates will remain in effect through December 31, 1992, and are subject to change on January 1, 1993.

Dated: October 13, 1992.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, October 21, 1992 (57 FR 48080)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 152.2

NOTIFICATION TO IMPORTER OF INCREASED DUTIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend section 152.2 of the Customs Regulations (19 CFR 152.2) to provide that the district director of Customs shall notify the importer on Customs Form 29, Notice of Action, when the estimated aggregate of the increase in duties on an entry exceeds $100. This proposed change will lessen the administrative burden and costs incurred by Customs associated with notifying the importer of minimal increases in duty. It will also reduce the number of pieces of correspondence received by importers and their Customs brokers which are associated with the particular entry.

DATE: Comments must be received on or before December 22, 1992.

ADDRESS: Comments (preferably in triplicate) must be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2119, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Deann Seckler, Entry Rulings Branch, (202–566–5856).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 152.2 of the Customs Regulations (19 CFR 152.2) presently requires that the importer be notified on Customs Form 28 when the estimated aggregate of the increase in duties on an entry exceeds $15. The administrative costs incurred by Customs in notifying importers of increases in duty ranging between $15 and $100 are disproportionate to the amount of duties involved. This proposed change will lessen the administrative burden and costs associated with notifying the importer of minimal increases in duty. An increase in the minimum amount to $100 will not result in a significant reduction of services provided to the importing public. It will also reduce the number of pieces of correspon-

dence received by importers and their Customs brokers which are associated with the entries. In addition, 19 CFR 152.2 presently incorrectly specifies CF–28, instead of CF–29, as the Customs Form for notifying the importer.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments that are timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m., at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C.

REGULATORY FLEXIBILITY ACT

For the reasons set forth in the preamble and pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is hereby certified that the proposed amendments set forth in this document, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Deann Seckler, Entry Rulings Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 152

Customs duties and inspection.

PROPOSED AMENDMENT

It is proposed to amend Part 152, Customs Regulations (19 CFR Part 152), as set forth below:

PART 152 – CLASSIFICATION AND APPRAISEMENT OF MERCHANDISE

1. The general authority citation for Part 152 continues to read as follows:

Authority: 19 U.S.C. 66, 1401a, 1500, 1502, 1624.

* * * * * * *

2. It is proposed to revise section 152.2 to read as follows:

§ 152.2 Notification to importer of increased duties.

If the district director believes that the entered rate or value of any merchandise is too low, or if he finds that the quantity imported exceeds the entered quantity, and the estimated aggregate of the increase in duties on that entry exceeds $100, he shall promptly notify the importer on Customs Form 29, specifying the nature of the difference on the notice. Liquidation shall be made promptly and shall not be withheld for a period of more than 20 days from the date of mailing of such notice unless in the judgment of the district director there are compelling reasons that would warrant such action.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: September 24, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 23, 1992 (57 FR 48347)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–174)

UNITED STATES, PLAINTIFF *v.*
MODES, INC. AND JAIKISHAN C. BUDHRANI, DEFENDANTS

Court No. 89–04–00206

OPINION AND ORDER

Appearances:

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Velta A. Melnbrencis*, Assistant Director; *Michael S. Kane*, Esq., for plaintiff.

Golden, Potts, Boeckman & Wilson (*Claude R. Wilson, Jr.*, Esq.) for defendants.

[Plaintiff's motion for partial summary judgment granted; defendants' cross-motion for summary judgment denied.]

(Dated October 7, 1992)

INTRODUCTION

NEWMAN, *Senior Judge:* This is an action brought by the Government to collect a civil penalty from defendants pursuant to 19 U.S.C. § 1592 (1988). The Government moves for partial summary judgment on the issue of liability for intentional falsification of invoices in connection with defendants' importations of Taiwanese jewelry. In the alternative, the Government moves for partial summary judgment on a theory of grossly negligent or negligent violations of § 1592.

Defendants oppose the Government's motion and cross-move for summary judgment on the merits and raise the statute of limitations as an affirmative defense concerning certain entries.

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1582 (1988).

UNDISPUTED FACTS

Defendant Modes, Inc. is a closely held corporation headquartered in Dallas, Texas initially created for the purpose of importing tailored clothing from Hong Kong. From 1984 to 1985 defendant Jaikishan C. Budhrani was Vice-President of Modes.

Commencing in January 1984, Modes imported "twist beads" from Itai International Co., Ltd. and Ralone Co., Ltd., Taiwanese export companies operated by Mr. Chester Chou. In accordance with an arrange-

ment entered into between Budhrani and Chou "a month or two" after the initial entry the jewelry, on or around January 11, 1984, purchases of jewelry from the Chou companies took place under two separate invoices.

The first invoice, which accompanied the merchandise, was filed with the United States Customs Service ("Customs"). That invoice, however, stated a lower price than was actually agreed upon between the parties and ultimately paid for the jewelry. For each transaction, Modes cut a check to the exporter in the amount of the first invoice.

The second invoice for the true price of the goods was then sent by the exporter directly to Modes. This second invoice was neither filed with nor disclosed to Customs. Modes then cut a second check to the exporter in the amount of the outstanding balance of the shipment, *i.e.*, the difference between the price terms appearing on the two invoices. This double-invoicing arrangement continued from January to November of 1984.

It appears that Budhrani agreed to Chou's double-invoicing scheme because it was a necessary business accommodation to his supplier's efforts to evade Taiwanese income taxes and because the goods were duty-free. Budhrani admitted in his deposition that he knew that the double invoicing scheme was illegal. Dep. at 46, Appendix at 110.

In November 1984, Budhrani learned that Customs had initiated an investigation into the double invoicing scheme. Shortly thereafter, Budhrani discovered that his false invoices adversely impacted calculations under the Generalized System of Preferences ("GSP") when he sought the advice of counsel in connection with the pending investigation. Budhrani thereafter discontinued the double-invoicing arrangement with Chou.

Discussion

I

As a threshold matter, a motion for summary judgment is appropriate where there is no genuine issue of material fact requiring a trial and the moving party is entitled to judgment in its favor as a matter of law. USCIT R. 56(d); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986); *Anderson v. Liberty Lobby,* 477 U.S. 242, 250 (1986); *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987).

The court concludes that, on the issue of liability, partial summary judgment in favor of the Government is appropriate in this case, since the undisputed facts show that Budhrani intentionally submitted false invoices to Customs when entering the goods, deceiving the Government as to their true purchase price, and that such invoices were fraudulent and material in violation of § 1592. Defendants' affirmative defense of the statute of limitations is rejected.

II

On the cross-motions pursuant to CIT Rule 56 and the evidentiary and other submissions of the parties in support thereof, the court must

determine whether an issue of material fact has been raised as to preclude summary judgment. This determination will be resolved by reference to the substantive law of the case, which is the statute itself, as supplemented by reasonable regulatory interpretations by Customs. *See Anderson,* 477 U.S. at 248.

Importers are required to file true and accurate invoices with Customs. *See* 19 U.S.C. §§ 1481, 1485. Section 1485 provides, *inter alia,* that persons making an entry of goods must file a declaration under oath that the prices set forth in an invoice are true. Where it has been established that false invoices have been filed, the Government may seek to collect civil penalties for fraudulent, grossly negligent or negligent violations of the statute under § 1592, which is the principal enforcement mechanism of the customs laws for false invoicing. The relevant portions of § 1592 provide:

> **§ 1592 Penalties for fraud, gross negligence and negligence.**
>
> (a) Prohibition. –
>
> (1) General rule. – Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence –
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of –
>
> (i) any document, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

Resolution of the cross-motions for summary judgment requires, therefore, that the court determine: (1) whether the false statements were *fraudulently* made; (2) if so, whether the fraudulent statements were *material;* and (3) to what extent the entries were made *by means of* the false invoices.

A. *Fraud:*

There is no genuine issue of fact that in connection with making entries of its jewelry, Modes submitted to Customs invoices containing false purchase prices that had a material bearing on the valuation of the goods. The Government asserts that here defendants' false invoices meet the most stringent level of culpability under § 1592, *viz.,* they were *fraudulent* in that defendants concededly entered the goods under *intentionally false* statements concerning purchase prices.

However, in support of their position that the invoices while concededly false were not "fraudulent," defendants cite a regulation promulgated by Customs in 1984. That regulation specifically sets forth Customs' definition of fraud for purposes of § 1592:

> (3) Fraud. A violation is determined to be fraudulent if it results from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws

of the United States, as established by clear and convincing evidence.

19 C.F.R. Pt. 171, App. B(B)(3)(1984). The court agrees with defendants that Customs' 1984 definition of fraud, as defined its regulation, is controlling as to defendants' liability for fraud in the relevant time period involved in this case. By predicating liability for fraud on clear and convincing evidence of specific forms of defendant's intent – "defraud the revenue," or the more broadly based intent, "to otherwise violate the laws of the United States" – Customs assumed a burden of proof under its regulation of more than simply showing that defendants presented to Customs an intentionally false document. *"Intent" as to consequences was made by the regulation the sine qua non of a fraudulent violation under the statute.*[1]

Defendants' liability for fraud under the first formulation of intent – to defraud the revenue – may be quickly disposed of as a matter of fact. The jewelry in question was accorded duty-free treatment under the Generalized System of Preferences ("GSP") established under the Trade Act of 1974. Pub. L. 93–618, Title V, § 501 *et seq.*, Jan. 3, 1975, 88 Stat. 2066, codified as amended at 19 U.S.C. § 2461 *et seq.*, (1988). Notwithstanding the duty-free status of the goods at the time of the entries in question, the Government contends that false price terms on the invoices were material to an intent to defraud the revenue since pricing and valuation formed the basis of data upon which the Treasury Department relied in determining eligibility for duty-free treatment under GSP of goods such as that imported by defendant.

The substance of the Government's argument that Budhrani intended to defraud the revenues is that a statistical distortion resulting from undervaluation of duty-free imports tends to prolong eligibility for duty-free GSP treatment beyond the time at which such treatment would terminate if the true prices, and hence valuations, were reported. Thus, according to the Government, defendants, in essence, intended to defraud the Government of potential future revenues. Under this rationale, even though defendants' understatement of price on the invoices had no immediate revenue impact on the duty-free entries, the false invoices were material to loss of revenues from *future* dutiable entries of merchandise from Taiwan under the same tariff classification.

Defendants argue that there is nothing before the court to contradict their showing that Budhrani was unaware of the GSP prior to being informed of the program during the Customs investigation in November 1984; and at the least, an issue of material fact exists as to whether

---

[1] This 1984 concept of fraud was changed somewhat in 1989 when Customs promulgated the current definition which more closely follows the traditional common law criterion of fraud that requires only an intent to make a materially false statement without regard to intent as to the specific consequences of the deception. Thus, with reference to amending the 1984 regulation, Customs commented:

> By amending the definition of fraud under the guidelines, Customs merely is adhering to the general principle applied in civil fraud cases that "the intent which becomes important is the intent to deceive, to mislead, to convey a false impression." Thus, the intent under the new definition is directed to the making of the false representation or omission, *as opposed to causing the consequences of such representation or omission (e.g., duty loss, quota violation, etc.*

Cust. B. & D., No. 38 at 3 (Sept. 20, 1989) (T.D. 89–83).

Budhrani at the time he submitted the false invoices to Customs had an intent to defraud the revenues.

Under the definitional language of the regulation, the court holds that an intent to defraud the Government of potential *future* revenues from imports falls within the parameters of fraud liability under § 1592 and the regulation. However, the court finds no genuine issue of fact as to whether Budhrani was aware of the GSP program and the potential effect on future revenues under the program of his false invoice pricing. In short, the court finds that defendants' evidence has successfully negated intent to defraud the revenues. *See* Affidavit of Jaikishan Budhrani at 2–3.

The court does not, however, accept defendants' argument that application of the regulation to the facts of this case completely absolves them of liability for fraud since the regulation goes on to provide the broad formulation: an intent to "otherwise violate the laws of the United States." 19 C.F.R. Pt. 171, App. B(B)(3)(1984).

Specifically, by the double invoicing scheme defendants are accused of having intentionally violated 19 U.S.C. §§ 1481 and 1485 – which require that importers file truthful invoices – and consequently, violated § 1592. Defendants' contention that they did not know that their false invoices would defraud the Government of revenues is not dispositive of whether defendants intended to violate U.S. law within the meaning of the regulation. The admittedly false invoices presented to Customs with the entries coupled with Budhrani's critical and unqualified admission in his deposition that he knew that the double invoicing scheme was not "legal" is dispositive of his liability for fraud under § 1592 pursuant to the second broad formulation for fraudulent intent under the regulation.[2]

Budhrani attempts to repudiate his deposition admission of the illegality of his double invoicing scheme by his subsequent affidavit statement asserting that he was unaware that false invoicing is illegal if the goods are duty-free. Affidavit of Jaikishan Budhrani at 2–3. However, where the party opposing summary judgment makes an admission of fact in response to an unambiguous question in a deposition, that party may not thereafter defeat the motion merely by submitting an affidavit containing conclusory contradictions of the previously admitted facts. *See, e.g., Lovejoy Electronics, Inc. v. O'Berto,* 873 F.2d 1001, 1005 (7th Cir. 1989); *Van T. Junkins and Associates v. U.S. Industries,* 736 F.2d 656, 657 (11th Cir. 1984); *Radobenko v. Animated Equipment Corpora-*

[2] The critical portion of Budhrani's deposition testimony is as follows:

Q: Okay. Even though you may not have understood the term GSP, or general specialized [sic] preferences, you did understand that the goods you were bringing in were duty free –

A: Yes.

Q: – meaning you did not –

A: Yes, I knew that.

Q: – have to pay duty on that?

Q: Okay. And you did know that the double invoicing scheme was not legal?

A: Yes, ma'am.

Deposition of Jaikishan Budhrani at 46, App. at 110.

tion, 520 F.2d 540, 544 (9th Cir. 1975); *Perma Research & Development Co. v. Singer Co.,* 410 F.2d 572, 578 (2d Cir. 1969).

The court determines that, by asserting his ignorance of the GSP program Budhrani has put forth, at best, a feigned issue of fact concerning defendants' intent in the double invoicing scheme, as described *supra,* and that the only material fact for purposes of the instant motion is that Budhrani appreciated at the time he made entries of his goods that he was acting illegally in submitting false invoices to Customs. Further, the court concludes that as a matter of law defendants' conduct constituted actionable fraud under § 1592.

B. *Materiality:*

Whether fraudulent misrepresentations of price are material is initially an issue of law for the court. *See United States v. Daewoo Int'l (America) Corp.,* 12 CIT 889, 895, 696 F. Supp. 1534, 1540 *modified,* 13 CIT 76, 707 F. Supp. 1067 (1988); *United States v. Rockwell Int'l Corp.,* 10 CIT 38, 42, 628 F. Supp. 206, 209–210 (1986). Once again, Customs has supplied a definition that governs the transactions in question:

> A document, statement, act or omission is material if it has the *potential* to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty, or if it tends to conceal an unfair trade practice under the antidumping, countervailing duty or a similar statute, or an unfair act involving patent or copyright infringement.

19 C.F.R. Pt. 171, App. B(A) (1984) (emphasis added). Defendants rely on this regulation, arguing that these false invoices are not "material" to goods entered duty-free under the GSP since the prices stated had no "potential to alter the classification, appraisement, or the admissibility of merchandise, or the liability for duty." The court cannot agree.

True, no duty would have been paid on defendants' jewelry imported in 1984, even had the prices been vastly *overstated.* Nevertheless, the court cannot agree with defendants' contention that the invoices impacted on neither the appraisements nor liability for duty.

Fundamentally, purchase price is highly material to the valuation of merchandise, *see* 19 U.S.C. § 1401a(b) (Transaction value of imported merchandise), and the double invoicing scheme obviously had the "potential" to alter the valuation of the goods imported in 1984. Moreover, even if erroneous appraised valuations of defendants' merchandise (caused by the double invoicing scheme) did not have the potential to affect the dutiability of the jewelry in the 1984 entries, defendants' fraud had the "potential" prospectively to impact defendants' liability for duty on future importations of jewelry from Taiwan.

Under the 1984 amendments to the Trade Act of 1974, the President conducts a periodic review of the eligibility of goods for continued duty-free treatment. 19 U.S.C. § 2464(c). In the course of this review, the total appraised value of goods imported from the beneficiary developing country in any given year is compared to either of two base figures. *See id.* If the appraised value of the goods from the beneficiary country (in

this case, Taiwan) exceeds either of those two comparison amounts, preferential treatment must be withdrawn in the following year. *See Florsheim Shoe Co. v. United States,* 2 Fed. Cir. (T) 83, 92, 744 F.2d 787, 793 (Fed. Cir. 1984) (presidential termination of GSP treatment mandatory under § 504(c) of Trade Act if imports from beneficiary country exceed GSP cap under competitive needs formula).

Thus, viewed prospectively, a false invoice statement of price at the time of entry has the potential to alter the appraised values and, as a result, the potential to alter liability for duty on goods entering from the same country of origin and under the same classification as early as one year from the time of the false statement. *A fortiori,* defendants' fraudulent invoices *were* "material" within the scope of § 1592 and 19 C.F.R. Pt. 171, App. B(A) (1984)—a conclusion that becomes even more compelling in light of the fact that GSP eligibility for Taiwanese jewelry *was* in fact withdrawn in 1985.

The purpose of the GSP would be ill served by defendants' proposed narrow and unworkable construction of the term "material" in § 1592. Duty-free treatment under the GSP is intended to be available only until such time as the goods to be imported become competitive with domestic producers in the American market. *See* 1974 U.S.C.C.A.N. 7186, 7356–57. Thus, the logical consequence of defendants' position would be that importers could, with impunity and without offending the laws of the United States, declare false price terms to Customs, artificially extending their duty-free privileges well beyond the point where such treatment is economically justified and legally permissible. Such an irrational result is to be avoided if a fair reading of the statute and regulation defining "material" encompasses *the potential for an alteration of appraised values affecting prospective duty liability.* The court holds that § 1592 and 19 C.F.R. Pt. 171, App. B(A) (1984) may be fairly so construed, and therefore, as a matter of law defendants' fraudulent invoices were "material."

C. *"By Means Of":*

Section 1592 (a) requires that the false document be the "means of" the entry or introduction of merchandise into the United States. This provision simply requires that the false document or information be submitted to Customs in connection with the entry or importation of the merchandise.

Under defendants' construction of the "by means of" language, the false representation must necessarily be made in connection with merchandise that, but for that representation, would not be admissible. In support of their position, defendants rely upon *United States v. Teraoka,* 669 F.2d 577 (9th Cir. 1982) and its recent progeny, *United States v. Corcuera-Valor,* 910 F.2d 198, 199–200 (5th Cir. 1990); *See also, United States v. Ven-Fuel, Inc.,* 602 F.2d 747, 753 (5th Cir. 1979), *cert. denied sub nom. Ven-Fuel, Inc. v. Duncan,* 447 U.S. 905 (1980); *United States v. Rose,* 570 F.2d 1358, 1363 (9th Cir. 1978).

The *Teraoka* line of cases involved interpretation of similar language in the criminal analogue to § 1592, which is to be found in 18 U.S.C. § 542 (1988). In *Teraoka,* the Ninth Circuit held that importation of goods violated § 542 only where the false statements resulted in the importation of merchandise that was otherwise excludable. 669 F.2d at 579. This construction of § 542 assumed that the purpose of the section is to exclude from the commerce of the United States goods that cannot lawfully be imported, a conclusion that other circuits have declined to reach. *See, e.g., United States v. Bagnall,* 907 F.2d 432, 436 (3rd Cir. 1990)(purpose of § 542 is to preserve the integrity of process by which foreign goods are imported into the United States); *Ven-Fuel,* 758 F.2d at 762 (convictions regularly upheld where false statements made in connection with generically importable goods).

Defendants' attempt to impose the Ninth Circuit's restrictive reading of the "by means of" language on § 1592 is without merit. The *Teraoka* rationale has been widely rejected within the civil penalty context of § 1592. As the court observed in *United States v. F.A.G. Bearings Corp. Ltd.,* 8 CIT 201, 615 F. Supp. 562 (1984), a reading of the statute permitting civil penalties only where the fraudulent statement concerned otherwise excludable goods "would emasculate [§ 1592], depriving the United States Government of one of its more effective and widely-used customs civil enforcement statutes." 8 CIT at 209; 615 F. Supp. at 569. *See also, Daewoo,* 12 CIT at 897, 696 F. Supp. at 1542 ("[t]he bounds of § 1592 reach to false statements and practices in relation to lawfully imported merchandise."); *Ven-Fuel,* 758 F.2d at 762 (restrictive interpretation of "by means of" language would render § 1592 meaningless in a large number of cases). Defendants' proposed construction of the statute is further defeated by comparison to judicial interpretation of similarly worded enforcement provisions under previous customs statutes. Imposition of penalties under those statutes, which contained the same "by means of" language, was predicated upon false statements concerning value, origin, quantity and price in connection with the entry of goods which were not otherwise excludable. *See United States v. Twenty-five Packages of Panama Hats,* 231 U.S. 358, 360 (1913).

Finally, defendants' interpretation would accomplish an absurd result. If liability were confined to those cases involving restricted or excludable merchandise, importers would be at liberty to submit false valuation for all other goods without triggering civil liability under the statute, thereby avoiding the payment of duty in particular and the obligation to comply with American import laws generally. *See Daewoo,* 12 CIT at 895, 696 F. Supp. at 1540 (overvaluation of admissible goods to avoid trigger price mechanism and imposition of antidumping duties violates § 1592).

In sum, the court rejects defendants' interpretation, finds that there is no genuine factual dispute that the false invoices were presented to Customs in connection with the importation and entry of jewelry, and

holds that, as a matter of law, such invoices fall within the scope of § 1592.

III

The final issue to be resolved is whether the statute of limitations bars recovery of fraud penalties by the Government for certain entries. Actions brought under § 1592 are subject to a five-year statute of limitations, which provides, in relevant part:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered.

19 U.S.C. § 1621 (1988). Section 1621 adopts the discovery rule in fraud cases, which tolls the limitations period until the time the fraud is discovered. Thus, under the discovery rule the statute of limitations is tolled until the date when the plaintiff first learns of the fraud or is sufficiently on notice as to the possibility of fraud to discover its existence with the exercise of due diligence. *United States v. R.I.T.A. Organics, Inc.*, 487 F. Supp. 75, 77 (N.D. Ill. 1980).

Defendants argue that the discovery rule is unavailable in this case because the Government failed to plead its compliance with the statute of limitations in the complaint.[3] Consequently, defendants assert that the action is time barred as to all entries of twist beads more than five years prior to the commencement of the action on April 20, 1989.

The parties are in agreement that the action is timely as to all entries filed after April 25, 1984, and liability for fraud in connection with those entries is accordingly unaffected by defendants' statute of limitations defense. The Government identifies 18 of the 74 shipments as having been entered in the period between January 11, 1984 and April 20, 1984. As to those entries, the Government takes the position that the statutory five-year period was tolled until August 23, 1984 because Customs did not discover the double-invoicing scheme until that date. If the latter statement is factual, then the statutory period was tolled until the date of discovery, and when the Government finally did bring this action on April 20, 1989, it was timely under the statute of limitations with approximately four months to spare.

In support of this position, the Government submitted the affidavit of Mr. Harvey McFadden, an Import Specialist with Customs. In substance, the McFadden affidavit indicates that on August 23, 1984 he discovered the double invoicing scheme in connection with the entry of twist beads that had taken place on April 27, 1984.

According to McFadden, after the April 27 entry, Modes submitted a corrected invoice on May 23, 1984; submission of corrected invoices was

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[3] The complaint did not specify when or how the Government first discovered the double-invoicing scheme. The Government first alleged the date of discovery in reply to a statute of limitations defense set forth in defendants' brief in opposition to the Government's motion for partial summary judgment. The Government submitted an affidavit from an Import Specialist employed by Customs detailing the circumstances by which the Government discovered the fraud. The pertinent details are set forth, *infra*.

routinely required from importers and customhouse brokers, thereby making May 23, 1984 an unlikely date for discovery of fraud; his suspicion was not triggered at that point in time because he thought that the second invoice was sent to him by mistake; and the usual practice is to set corrected invoices aside and "associate" them with entry files when time permits. Thus, according to McFadden, it was not until August 23, 1984 that he matched up the entry file with the corrected invoice and discovered a discrepancy in value information. In short, taking the Government's version of the facts at face value it would seem that Customs neither knew, nor with the exercise of due diligence could have known that Modes and Chou were double-invoicing shipments of jewelry until August 23, 1984.

For the purposes of a summary judgment motion, the Government's uncontroverted McFadden affidavit would ordinarily be dispositive of the date of discovery issue. However, defendants contend that the Government was required to plead the date of discovery in the complaint. Accordingly, argue defendants, the Government should be precluded from relying on the discovery rule for the earlier entries. This position suggests that, although the Government may not have been able to discover defendants' fraud with due diligence until well after the fraud was initially committed, the running of the statutory period should not be deemed to have been tolled because the Government failed properly to invoke the protection of the rule in its complaint. This presents an issue of law for the court to resolve.

Defendants cite *United States v. Gordon,* 7 CIT 350 (1984) for the proposition that the Government's failure to plead the date of discovery of the alleged fraud in the complaint totally deprives the Government of the benefit of the discovery rule, thereby limiting recovery to those transactions that occurred within five years prior to the commencement of the action. The Government responds that, notwithstanding the failure to plead the date of discovery in the complaint, it may rely upon the discovery rule because defendants are not prejudiced at this stage of the litigation by defendants' tardy reliance on the date of discovery to toll the statute of limitations. *See, United States v. Thorson Chem. Corp.,* Slip Op. 92–84 at 9, n.5 (May 28, 1992) (defendant not prejudiced when it had opportunity to file opposing brief after Government filed motion to strike affirmative defense of statute of limitations); *United States v. Neman,* 784 F. Supp. 897, 898 (1992).

The court agrees with the Government's contention that its tardy reliance on the discovery rule does not bar it from the benefit of the rule. Such was not the result in *Gordon* or *Thorson,* and it is unwarranted in this case. Consequently, absent any claim or showing of prejudice to defendants due to the Government's failure to plead the date of discovery in the complaint coupled with no attempt by defendants to controvert the McFadden affidavit, the court finds no genuine issue of fact concerning the date of discovery – August 23, 1984 – and hence finds that this

action was filed within the statute of limitations as to all the subject entries.

CONCLUSION

ORDERED that the Government's motion for partial summary judgment is GRANTED as to all entries in this case; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied.

(Slip Op. 92–175)

MELCO CLOTHING CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–01–00058

MEMORANDUM OPINION AND ORDER

Appearances:

Gutglass, Erickson & Bonville (*Paul R. Erickson,* Esq.), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney-In-Charge, International Trade Field Office; *Mark S. Sochaczewsky,* Esq., for defendant.

[Defendant's motion to sever and dismiss for lack of jurisdiction is granted. Defendant granted an extension of time in which to answer plaintiff's amended complaint.]

(Decided October 13, 1992)

INTRODUCTION

NEWMAN, *Senior Judge:* Defendant's motion to sever and dismiss for lack of jurisdiction is granted since, at the time the action was commenced, plaintiff had not paid all liquidated duties as required by 28 U.S.C. § 2–637(a). The provision in section 2637 with respect to the payment of all liquidated duties at the time the action is commenced is a strict requirement for invoking the jurisdiction of the Court of International Trade in an action brought under section 1581(a) to contest the denial of a protest. Plaintiff cannot cure the jurisdictional defect by amending the complaint. Defendant is granted an extension of time to answer the amended complaint.

BACKGROUND

Melco Clothing Co., Inc. (hereinafter "Melco") brought this action pursuant to section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (1988), to contest the denial of its protests in connection with entries of men's clothing. Following the denial of its protests, Melco filed a summons in this court on January 23, 1991. It is undisputed by Melco that, concerning the five entries at issue here, liquidated duties were not

paid to Customs until February 14, 1992.[1] Melco filed an amended complaint on April 23, 1992, including an allegation that "all liquidated duties in the Protests and Entries outlined in the Summons and Amended Summons have been paid on or before February 14, 1992." Brief in Opposition to Defendant's Motion to Dismiss at 1.

DISCUSSION

Defendant has moved under USCIT R. 12(b) to dismiss the action with regard to the entries for which liquidated duties were not paid prior to the filing of the summons and the original complaint. Defendant argues that under section 2637(a) this court lacks jurisdiction whenever liquidated duties have not been paid at the time the action is commenced. Melco counters that under USCIT R. 15(c) the filing of an amended complaint after a late payment of duties has the effect of curing the failure to pay those duties in a timely manner because the claims contained in an amended complaint relate back to the commencement of the action. Since those claims involve an allegation of compliance with section 2637(a), Melco asserts that the action should be treated as though the duties had been timely paid. However, the court agrees with defendant that the jurisdictional prerequisite of section 2637(a) cannot be satisfied by the late payment of duties, followed by the filing of an amended complaint.

An action to contest a denial of a protest is deemed commenced on the date when the summons is filed. USCIT R. 3; *Penrod Drilling Co. v. United States,* 13 CIT 1005, 1007, 727 F. Supp. 1463, 1465 (1989), *aff'd,* 925 F.2d 406 (Fed. Cir. 1991). The payment of all liquidated duties, charges or exactions at the time the action is commenced is a condition precedent that must be satisfied *before* invoking the jurisdiction of this court. *Id. See also Glamorise Foundations, Inc., v. United States,* 11 CIT 394, 396–97, 661 F. Supp. 630, 632 (1987); *Nature's Farm Products, Inc. v. United States,* 10 CIT 676, 648 F. Supp. 6 (1986), *aff'd,* 5 Fed. Cir. (T) 103, 819 F.2d 1127 (Fed. Cir. 1987). This condition is to be strictly applied and is not subject to implied exceptions. *Glamorise,* 11 CIT at 397, 661 F. Supp. at 632–33 (citing *NEC Corp. v. United States,* 5 Fed. Cir. (T) 49, 51, 806 F.2d 247, 249 (Fed. Cir. 1986)).

Nevertheless, Melco contends that the liberal pleading rules of this court permit plaintiff to cure the jurisdictional defect of nonpayment of duties. Specifically, Melco proposes that by paying the duties after the filing of the summons and then pleading its tardy compliance with section 2637(a) in an amended complaint, its factual allegation of compliance with the statute "relates back" under USCIT R. 15(c) to the commencement of this action. Under this interpretation, Melco would be deemed to have paid the liquidated duties at the time the action was commenced. While there are no cases precisely addressing this point under USCIT R. 15(c), the court can rely upon ample authority concerning

[1] The Protest Numbers which are the subject of the government's motion to sever and dismiss are 3701–89–000036 and 3701–89–000088. They cover Entry Nos. 210–0223720–0, 210–0225439–5, 210–0223947–9, 210–0224070–9 and 210–0227449–2.

the mirror provision of Rule 15(c) in the Federal Rules of Civil Procedure. *See Tomoegawa (U.S.A.), Inc. v. United States,* 15 CIT ____, Slip Op. 91–35 at 8 (April 29, 1991) (citing *Zenith Radio Corp. v. United States,* 5 Fed. Cir. (T) 111, 114, 823 F.2d 518, 521 (Fed. Cir. 1987)). Melco's interpretation of Rule 15(c) is erroneous.

Leave to amend pleadings is generally liberally granted under Rule 15(a). *See, e.g., United States v. Gold Mountain Coffee,* 9 CIT 16, 17 (1985). If a jurisdictional basis is not lacking but has merely been imperfectly pleaded, an action will not be dismissed solely on account of technical defects in the body of the complaint. *See Warth v. Seldin,* 422 U.S. 490, 501 (1975); *Local 179, United Textile Workers of America, AFL–CIO v. Federal Paper Stock Co.,* 461 F.2d 849, 851 (8th Cir. 1972).

However, Melco's reliance upon the "relation back" principle of Rule 15(c) is misplaced. The rule provides, in pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

USCIT R. 15(c). The rule permitting relation back of amendments derives from the policy that once litigation has commenced regarding a given claim, the parties are not entitled to the protection of the statute of limitations against claims and defenses that arise out of the same transaction or occurrence stated in the original pleading. 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1496 (1990). Thus, an amendment that does no more than correct a technical deficiency or that merely modifies the facts alleged in the original complaint will relate back under Rule 15(c). *See Intrepid v. Pollock,* 907 F.2d 1125, 1128–30 (Fed. Cir. 1990). But the instant case is unsuited for Melco's proposed use of the "relation back" principle.

Plaintiff's purpose in amending its complaint is utterly unrelated to the policies underlying Rule 15(c). Melco is not in the position of the plaintiff who seeks to avoid the operation of the statute of limitations when correcting a technical deficiency in the form or content of the original pleadings. Rather, Melco seeks to use a procedural device to enlarge the jurisdiction of the court, a tactic that has already been rejected in the plainest possible terms. *See Finley v. United States,* 490 U.S. 545, 553 at n. 6 (1989) (rules of procedure only implement the jurisdiction otherwise granted by Congress); *Port Drum Co. v. Umphrey,* 852 F.2d 148, 149 (5th Cir. 1988) (rule 11 does not create a right of action independent of statute); *Doe v. O'Bannon,* 91 F.R.D. 442, 447 (E.D. Pa. 1981) ("relation back" principle of rule 15(c) cannot be used artificially to create constitutional prerequisite of standing or otherwise enlarge federal jurisdiction). The insurmountable hurdle that Melco faces here is not an imperfect pleading of jurisdiction in the complaint but rather a complete absence thereof from the time the summons was filed. The court must determine the existence of jurisdiction from the time the summons was filed and not from the time of the amended pleading. *See Church of Sci-*

entology of Colorado v. United States, 499 F. Supp. 1085, 1088 (D. Colo. 1980) (facts occurring after complaint is filed cannot confer jurisdiction via amended complaint if sufficient jurisdictional facts did not occur at time complaint filed); *accord, People of the State of California v. Glendale Fed. S. and L. Ass'n,* 475 F. Supp. 728, 733 (C.D. Cal. 1979); *Coditron Corp. v. AFA Protective Systems, Inc.,* 392 F. Supp. 158, 161–62 (S.D.N.Y. 1975) (removal jurisdiction determined from the face of the complaint at the time of removal, not after belated addition of federal question claim). Here, the amended pleadings will not suffice to "relate back" the jurisdictional allegation.

Finally, the logical consequence of Melco's proposed misapplication of Rule 15 would be to render meaningless a well established line of cases requiring strict observance of section 2637(a) as a jurisdictional prerequisite in cases contesting the denial of a protest.

CONCLUSION

The nonpayment of liquidated duties for the five entries involved in this motion constituted a failure to satisfy an indispensable jurisdictional prerequisite to contesting Custom's denial of Melco's protest. It is accordingly

ORDERED that defendant's motion is granted and that Protest Numbers 3701–89–000036 and 3701–89–000088, together with the five entries to which they relate, are severed from this case and designated as Court No. 91–01–00058–S, and that with regard to the severed entries this action be and hereby is DISMISSED; and it is further

ORDERED that defendant's time to answer plaintiff's amended complaint as to the remaining entry is hereby extended ten (10) days after service of the court's determination herein and entry of this Order.

(Slip Op. 92–176)

BROTHER INDUSTRIES, LTD. AND BROTHER INTERNATIONAL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 88–11–00860

(Dated October 14, 1992)

AQUILINO, *Judge:* The plaintiffs having filed a motion for judgment on the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Portable Electric Typewriters From Japan Final Results of Antidumping Duty Administrative Review,* 53 Fed.Reg. 40,926 (Oct. 19, 1988); and the court having granted in part and denied in part plaintiffs' motion per Slip Op. 91–58, 15 CIT

____, 771 F.Supp. 374 (1991), and having remanded to the ITA for further proceedings; and the ITA having submitted the results of those proceedings to the court; and the plaintiffs having filed a motion for a second remand thereof; and the court having granted in part and denied in part plaintiffs' motion per Slip Op. 92–121, 16 CIT ____ (July 28, 1992), and having remanded to the ITA for further proceedings; and the ITA having submitted the results of those proceedings to the court in a document dated September 11, 1992; and the court having reviewed those remand results; and no party having objected to or otherwise commented on them; Now, therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the International Trade Administration, U.S. Department of Commerce's Final Results of Redetermination Pursuant to Court Remand dated September 11, 1992 be, and they hereby are, affirmed; and it is further

ORDERED, ADJUDGED and DECREED that this action be, and it now hereby is, dismissed.

(Slip Op. 92–177)

FEDERAL-MOGUL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE S.A., SKF GMBH, SKF INDUSTRIE, S.P.A., SKF (U.K.) LTD., SKF SVERIGE, AB, FAG KUGELFISCHER GEORG SCHAFER KGAA, FAG CUSCINETTI S.P.A., FAG (UK) LTD., BARDEN CORP. (UK) LTD., FAG BEARINGS CORP., BARDEN PRECISION BEARINGS CORP., RHP BEARINGS, AND RHP BEARINGS INC., DEFENDANT-INTERVENORS

Court No. 92–06–00422

Defendant-intervenors SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Ltd. and SKF Sverige, AB ("SKF") move pursuant to Rules 65 and 7 of the Rules of this Court to modify the preliminary injunction issued by this Court on July 14, 1992. SKF requests this Court to modify the preliminary injunction to order the U.S. Customs Service ("Customs") to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review. SKF will file a letter of credit to cover the amounts released.

Held: Cash deposits of estimated antidumping duties cannot be released or refunded until liquidation occurs. When an administrative review is judicially challenged, liquidation cannot occur until entry of final judgment.

[Defendant-intervenors' motion to modify the preliminary injunction denied.]

(Dated October 14, 1992)

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V* and *Larry Hampel*) for plaintiff Federal-Mogul Corporation.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marc E. Montalbine*); of counsel: *Stephen J. Claeys, Craig R. Giesze* and *Dean A. Pinkert*, Attorney-Advisors, Office

of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco* and *Thomas J. Trendl*) for defendant-intervenors SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Ltd. and SKF Sverige, AB.

Grunfeld, Desiderio, Lebowitz & Silverman (*Max F. Schutzman* and *Andrew B. Schroth*) for defendant-intervenors FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti SpA, FAG (UK) Ltd., Barden Corporation (UK) Ltd., FAG Bearings Corporation and Barden Precision Bearings Corporation.

Covington & Burling (*Harvey M. Applebaum* and *David R. Grace*) for RHP Bearings and RHP Bearings Inc.

OPINION

TSOUCALAS, *Judge:* Defendant-intervenors SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Limited and SKF Sverige, AB ("SKF") move pursuant to Rules 65 and 7 of the Rules of this Court to modify the preliminary injunction issued by this Court on July 14, 1992. SKF requests this Court to modify the preliminary injunction to order the U.S. Customs Service ("Customs") to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review of the antidumping duty orders covering antifriction bearings from various countries. SKF states that it will file a letter of credit to cover the amounts released.

BACKGROUND

On June 24, 1992, the Department of Commerce, International Trade Administration ("ITA"), published the final results of the second administrative review of antifriction bearings from nine countries subject to antidumping duty orders. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992).

On June 29, 1992, Federal-Mogul Corporation ("Federal-Mogul") filed a summons and on July 6, 1992, a complaint challenging the Final Results. On July 14, 1992, Federal-Mogul filed a consent motion requesting the Court to issue a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to this contested review. The Court granted Federal-Mogul's motion and issued the injunction on July 14, 1992. *Federal-Mogul Corp. v. United States,* Court No. 92–06–00422 (order granting preliminary injunction).

At the time the injunction issued, SKF was not a party to this action. On July 15, 1992, SKF's motion to intervene was granted. *Federal-Mogul Corp. v. United States,* Court No. 92–06–00422 (order granting SKF's motion to intervene). On August 6, 1992, SKF filed the motion currently before this Court seeking to modify the previously issued preliminary injunction.

In essence, SKF's argument is that for a number of years it has been required to post cash deposits of estimated antidumping duties with

Customs upon entry of antifriction bearings from the countries covered by the outstanding antidumping duty orders. The rates at which SKF was required to make deposits were derived from the initial less than fair value ("LTFV") investigation. *See, e.g., Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 18,997 (1989). The actual assessment rates calculated by the ITA in the challenged second administrative review are substantially lower than the rates of deposit from the LTFV investigation. *Final Results,* 57 Fed. Reg. at 28,361. SKF argues that (1) it was deprived of due process due to the issuance of a preliminary injunction affecting its property rights without its participation, (2) that this Court has the legal and judicial authority to modify the preliminary injunction to allow for the substitution of a letter of credit for cash deposits in excess of the rates calculated in the contested second administrative review as security pending judicial review, and (3) that it would be equitable for this Court to do so. *Memorandum in Support of Defendant-intervenors' Motion to Modify Preliminary Injunction* at 3–31. Defendant-intervenors FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti SpA, FAG (UK) Limited, Barden Corporation (UK) Limited, FAG Bearings Corporation and Barden Precision Bearings Corporation support SKF's motion. *Memorandum in Response to Motion of SKF USA, Inc., et al., Defendant-Intervenors, to Modify Preliminary Injunction.* Defendant-intervenors RHP Bearings and RHP Bearings Inc. take no position on SKF's motion.

Defendant and Federal-Mogul oppose SKF's motion. Defendant argues that the law precludes the relief SKF is requesting and as a result, this Court cannot exercise its equitable powers to grant SKF's motion. *Defendant's Memorandum in Opposition to Motion of SKF to Modify Preliminary Injunction* at 8–25. Federal-Mogul agrees with defendant. *Federal-Mogul Corporation's Opposition to Defendant-intervenors' Motion to Modify Preliminary Injunction* at 2–8, exhibit 1.

Discussion

This Court has broad powers to grant injunctive relief. *See* 28 U.S.C. §§ 1585, 2643(c)(1) (1988). In a case of judicial review of the final results of an antidumping duty administrative review, this Court

> may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

19 U.S.C. § 1516a(c)(2) (1988).

The purpose of enjoining liquidation of entries subject to a contested administrative review is to maintain the status quo and preserve the jurisdiction of the Court. *Zenith Radio Corp. v. United States,* 710 F.2d 806, 810 (Fed. Cir. 1983). That is what occurred in this action.

Liquidation of entries of merchandise subject to an injunction under 19 U.S.C. § 1516a(c)(2) can only occur "in accordance with the *final court decision in the action.*" 19 U.S.C. § 1516a(e) (1988) (emphasis added).

Cash deposits of estimated antidumping duties are governed by 19 U.S.C. § 1673e(a) (1988) which states in pertinent part:

> [T]he administering authority shall publish an antidumping duty order which –
>
> * * * * * * *
>
> (3) requires the deposit of estimated antidumping duties *pending liquidation* of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

(Emphasis added). There is no provision in the statute to allow for the substitution of any type of security, including a letter of credit, for these required cash deposits except during the time between the preliminary and final LTFV determinations. *See* 19 U.S.C. § 1673e(c) (1988). The provision allowing the posting of some type of security during the period between the preliminary and final LTFV determinations does not apply in this action.

In general, refund of excess estimated customs duties occurs only upon liquidation. 19 U.S.C. § 1520(a)(1) (1988). Refund of duties prior to liquidation can occur only upon a showing that any excess payment of estimated duties was due to a clerical error. 19 U.S.C. § 1520(a)(4) (1988). SKF does not argue, and there is no evidence, that its alleged payments of excess cash deposits of antidumping duties were due to a clerical error.

SKF's appeal to this Court to use its equity powers to grant its motion must be rejected because equity cannot be used to circumvent the law. *INS v. Pangilinan,* 486 U.S. 875, 883 (1987); *Hedges v. Dixon County,* 150 U.S. 182, 183 (1893). In addition, the equities of this situation are not as clear as SKF believes. SKF assumed the risk of importing the bearings at issue knowing full well that it would have to make the cash deposits it has in fact made and that these cash deposits would be unavailable to it until liquidation of the imports. That SKF may now be harmed by this decision is its own doing.

SKF's due process argument must also fail. Due process is not implicated unless SKF shows that it has a protected property interest. SKF has failed to show that it has such a protected property interest here. The cash deposits of estimated antidumping duties are "deposited to the credit of the Treasurer of the United States." 19 U.S.C. § 1512 (1988). At best, SKF has a mere expectation that it may receive some or all of this money back. However, the United States Supreme Court has stated that "a mere unilateral expectation * * * is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980); *see also National Wildlife Fed'n v. Burford,* 835 F.2d 305, 316 (D.C. Cir. 1987).

CONCLUSION

This Court finds that the statutory scheme is clear that release or refund of cash deposits of "estimated [antidumping] duties must await a final court decision and liquidation by the agency in accordance with that decision." *NTN Bearing Corp. of America v. United States*, 892 F.2d 1004, 1006 (Fed. Cir. 1989); *see also Diversified Prods. Corp. v. United States*, 7 CIT 49, 581 F. Supp. 736 (1984). Therefore, SKF's motion to modify the preliminary injunction must be denied.

(Slip. Op. 92–178)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE S.A., SKF GMBH, SKF INDUSTRIE, S.P.A., SKF (U.K.) LTD. AND SKF SVERIGE, AB, RHP BEARINGS, AND RHP BEARINGS INC., DEFENDANT-INTERVENORS

Court No. 92–07–00483

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review challenged in this action. Defendant-intervenors SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Ltd. and SKF Sverige, AB ("SKF") oppose Torrington's motion and request this Court to narrow the scope of the preliminary injunction requested by Torrington by ordering the U.S. Customs Service to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review. SKF will file a letter of credit to cover the amounts released.

Held: Cash deposits of estimated antidumping duties cannot be released or refunded until liquidation occurs. When an administrative review is judicially challenged, liquidation cannot occur until entry of final judgment.

[Plaintiff's motion for a preliminary injunction granted.]

(Dated October 14, 1992)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Myron A. Brilliant, Robert A. Weaver, Margaret E. O. Edozien* and *Wesley K. Caine*) for plaintiff.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley* and *Joseph A. Perna, V*) for plaintiff-intervenor Federal-Mogul Corporation.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marc E. Montalbine*); of counsel: *Stephen J. Claeys, Craig R. Giesze* and *Dean A. Pinkert*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco* and *Thomas Trendl*) for defendant-intervenors SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Ltd. and SKF Sverige AB.

Covington & Burling (*Harvey M. Applebaum* and *David R. Grace*) for RHP Bearings and RHP Bearings Inc.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review being challenged in this action. Defendant-intervenors SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Ltd. and SKF Sverige AB ("SKF") oppose Torrington's motion for a preliminary injunction. SKF requests this Court to narrow the scope of the requested preliminary injunction by ordering the U.S. Customs Service ("Customs") to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review of the antidumping duty orders covering antifriction bearings. SKF states that it will file a letter of credit to cover the amounts released.

BACKGROUND

On June 24, 1992, the Department of Commerce, International Trade Administration ("ITA"), published the final results of the second administrative review of antifriction bearings from nine countries subject to antidumping duty orders. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992).

On July 21, 1992, Torrington filed a summons and on August 20, 1992, a complaint challenging the Final Results. On August 20, 1992, Torrington filed a motion requesting this Court to issue a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to this contested review.

On September 9, 1992, SKF's motion to intervene was granted. *The Torrington Company v. United States,* Court No. 92–07–00483 (order granting SKF's motion to intervene). On September 11, 1992, SKF filed an opposition to Torrington's motion for a preliminary injunction seeking to narrow the scope of the preliminary injunction requested by Torrington.

In essence, SKF's argument is that for a number of years it has been required to post cash deposits of estimated antidumping duties with Customs upon entry of antifriction bearings from the countries covered by the outstanding antidumping duty orders. The rates at which SKF was required to make deposits were derived from the initial less than fair value ("LTFV") investigation. *See, e.g., Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other than Ta-*

pered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 18,992, 18,997 (1989). The actual assessment rates calculated by the ITA in the challenged second administrative review are substantially lower than the rates of deposit from the LTFV investigation. *Final Results,* 57 Fed. Reg. at 28,361. SKF argues that (1) issuance of the requested preliminary injunction will deprive SKF of its due process rights by adversely affecting its property rights without prior notice and the opportunity to comment, (2) that this Court has the legal and judicial authority to modify the preliminary injunction to allow for the substitution of a letter of credit for cash deposits in excess of the rates calculated in the contested second administrative review as security pending judicial review, and (3) that it would be equitable for this Court to do so. *Defendant-intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction* at 6–32.

DISCUSSION

This Court adheres to its decision in *Federal-Mogul v. United States,* 16 CIT ___, Slip Op. 92–177 (October 14, 1992) and finds that the statutory scheme is clear that release or refund of cash deposits of "estimated [antidumping] duties must await a final court decision and liquidation by the agency in accordance with that decision." *NTN Bearing Corp. of America v. United States,* 892 F.2d 1004, 1006 (Fed. Cir. 1989); *see also Diversified Prods. Corp. v. United States,* 7 CIT 49, 581 F. Supp. 736 (1984). In addition, SKF's due process argument in this action fails because SKF had the opportunity to comment on Torrington's motion and those comments have been carefully considered by this Court. Therefore, plaintiff's motion for a preliminary injunction is granted.

(Slip Op. 92–179)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF INDUSTRIE, S.P.A., DEFENDANT-INTERVENORS

Court No. 92–07–00489

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review challenged in this action. Defendant-intervenors SKF USA Inc. and SKF Industrie, S.p.A. ("SKF") oppose Torrington's motion and request this Court to narrow the scope of the preliminary injunction requested by Torrington by ordering the U.S. Customs Service to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in

the second administrative review. SKF will file a letter of credit to cover the amounts released.

Held: Cash deposits of estimated antidumping duties cannot be released-or refunded until liquidation occurs. When an administrative review is judicially challenged, liquidation cannot occur until entry of final judgment.

[Plaintiff's motion for a preliminary injunction granted.]

(Dated October 14, 1992)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Myron A. Brilliant, Robert A. Weaver, Margaret E. O. Edozien* and *Wesley K. Caine*) for plaintiff.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley* and *Joseph A. Perna, V*) for plaintiff-intervenor Federal-Mogul Corporation.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marc E. Montalbine*); of counsel: *Stephen J. Claeys, Craig R. Giesze* and *Dean A. Pinkert*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco* and *Thomas Trendl*) for defendant-intervenors SKF USA Inc. and SKF Industrie, S.p.A.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review being challenged in this action. Defendant-intervenors SKF USA Inc. and SKF Industrie, S.p.A. ("SKF") oppose Torrington's motion for a preliminary injunction. SKF requests this Court to narrow the scope of the requested preliminary injunction by ordering the U.S. Customs Service ("Customs") to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review of the antidumping duty orders covering antifriction bearings. SKF states that it will file a letter of credit to cover the amounts released.

BACKGROUND

On June 24, 1992, the Department of Commerce, International Trade Administration ("ITA"), published the final results of the second administrative review of antifriction bearings from nine countries subject to antidumping duty orders. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992).

On July 22, 1992, Torrington filed a summons and on August 21, 1992, a complaint challenging the Final Results. On August 21, 1992, Torrington filed a motion requesting this Court to issue a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to this contested review.

On September 4, 1992, SKF's motion to intervene was granted. *The Torrington Company v. United States,* Court No. 92–07–00489 (order

granting SKF's motion to intervene). On September 11, 1992, SKF filed an opposition to Torrington's motion for a preliminary injunction seeking to narrow the scope of the preliminary injunction requested by Torrington.

In essence, SKF's argument is that for a number of years it has been required to post cash deposits of estimated antidumping duties with Customs upon entry of antifriction bearings from the countries covered by the outstanding antidumping duty orders. The rates at which SKF was required to make deposits were derived from the initial less than fair value ("LTFV") investigation. *See, e.g., Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 18,997 (1989). The actual assessment rates calculated by the ITA in the challenged second administrative review are substantially lower than the rates of deposit from the LTFV investigation. *Final Results,* 57 Fed. Reg. at 28,361. SKF argues that (1) issuance of the requested preliminary injunction will deprive SKF of its due process rights by adversely affecting its property rights without prior notice and the opportunity to comment, (2) that this Court has the legal and judicial authority to modify the preliminary injunction to allow for the substitution of a letter of credit for cash deposits in excess of the rates calculated in the contested second administrative review as security pending judicial review, and (3) that it would be equitable for this Court to do so. *Defendant-intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction* at 6–32.

Discussion

This Court adheres to its decision in *Federal-Mogul v. United States,* 16 CIT ____, Slip Op. 92–177 (October 14, 1992) and finds that the statutory scheme is clear that release or refund of cash deposits of "estimated [antidumping] duties must await a final court decision and liquidation by the agency in accordance with that decision." *NTN Bearing Corp. of America v. United States,* 892 F.2d 1004, 1006 (Fed. Cir. 1989): *see also Diversified Prods. Corp. v. United States,* 7 CIT 49, 581 F. Supp. 736 (1984). In addition, SKF's due process argument in this action fails because SKF had the opportunity to comment on Torrington's motion and those comments have been carefully considered by this Court. Therefore, plaintiff's motion for a preliminary injunction is granted.

(Slip Op. 92–180)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF FRANCE S.A., DEFENDANT-INTERVENORS

Court No. 92–07–00491

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review challenged in this action. Defendant-intervenors SKF USA Inc. and SKF France S.A. ("SKF") oppose Torrington's motion and request this Court to narrow the scope of the preliminary injunction requested by Torrington by ordering the U.S. Customs Service to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review. SKF will file a letter of credit to cover the amounts released.

Held: Cash deposits of estimated antidumping duties cannot be released or refunded until liquidation occurs. When an administrative review is judicially challenged, liquidation cannot occur until entry of final judgment.

[Plaintiff's motion for a preliminary injunction granted.]

(Dated October 14, 1992)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Robert A. Weaver, Margaret E. O. Edozien,* and *Wesley K. Caine*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marc E. Montalbine*); of counsel: *Stephen J. Claeys, Craig R. Giesze* and *Dean A. Pinkert,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco* and *Thomas Trendl*) for defendant-intervenors SKF USA Inc. and SKF France S.A.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review being challenged in this action. Defendant-intervenors SKF USA Inc. and SKF France S.A. ("SKF") oppose Torrington's motion for a preliminary injunction. SKF requests this Court to narrow the scope of the requested preliminary injunction by ordering the U.S. Customs Service ("Customs") to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review of the antidumping duty orders covering antifriction bearings. SKF states that it will file a letter of credit to cover the amounts released.

BACKGROUND

On June 24, 1992, the Department of Commerce, International Trade Administration ("ITA"), published the final results of the second administrative review of antifriction bearings from nine countries subject

to antidumping duty orders. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992).

On July 22, 1992, Torrington filed a summons and on August 21, 1992, a complaint challenging the Final Results. On August 21, 1992, Torrington filed a motion requesting this Court to issue a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to this contested review.

On September 4, 1992, SKF's motion to intervene was granted. *The Torrington Company v. United States,* Court No. 92–07–00491 (order granting SKF's motion to intervene). On September 11, 1992, SKF filed an opposition to Torrington's motion for a preliminary injunction seeking to narrow the scope of the preliminary injunction requested by Torrington.

In essence, SKF's argument is that for a number of years it has been required to post cash deposits of estimated antidumping duties with Customs upon entry of antifriction bearings from the countries covered by the outstanding antidumping duty orders. The rates at which SKF was required to make deposits were derived from the initial less than fair value ("LTFV") investigation. *See, e.g., Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 18,997 (1989). The actual assessment rates calculated by the ITA in the challenged second administrative review are substantially lower than the rates of deposit from the LTFV investigation. *Final Results,* 57 Fed. Reg. at 28,361. SKF argues that (1) issuance of the requested preliminary injunction will deprive SKF of its due process rights by adversely affecting its property rights without prior notice and the opportunity to comment, (2) that this Court has the legal and judicial authority to modify the preliminary injunction to allow for the substitution of a letter of credit for cash deposits in excess of the rates calculated in the contested second administrative review as security pending judicial review, and (3) that it would be equitable for this Court to do so. *Defendant-intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction* at 6–31.

Discussion

This Court adheres to its decision in *Federal-Mogul v. United States,* 16 CIT ___, Slip Op. 92–177 (October 14, 1992) and finds that the statutory scheme is clear that release or refund of cash deposits of "estimated [antidumping] duties must await a final court decision and liquidation by the agency in accordance with that decision." *NTN Bearing Corp. of America v. United States,* 892 F.2d 1004, 1006 (Fed. Cir. 1989); *see also Diversified Prods. Corp. v. United States,* 7 CIT 49, 581 F. Supp. 736 (1984). In addition, SKF's due process argument in this action fails

because SKF had the opportunity to comment on Torrington's motion and those comments have been carefully considered by this Court. Therefore, plaintiff's motion for a preliminary injunction is granted.

(Slip Op. 92–181)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF (U.K.) LTD., DEFENDANT-INTERVENORS

Court No. 92–07–00492

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review challenged in this action. Defendant-intervenors SKF USA Inc. and SKF (U.K.) Limited ("SKF") oppose Torrington's motion and request this Court to narrow the scope of the preliminary injunction requested by Torrington by ordering the U.S. Customs Service to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review. SKF will file a letter of credit to cover the amounts released.

Held: Cash deposits of estimated antidumping duties cannot be released or refunded until liquidation occurs. When an administrative review is judicially challenged, liquidation cannot occur until entry of final judgment.

[Plaintiff's motion for a preliminary injunction granted.]

(Dated October 14, 1992)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Robert A. Weaver, Margaret E. O. Edozien* and *Wesley K. Caine*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marc E. Montalbine*); of counsel: *Stephen J. Claeys, Craig R. Giesze and Dean A. Pinkert*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco* and *Thomas Trendl*) for defendant-intervenors SKF USA Inc. and SKF (U.K.) Limited.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review being challenged in this action. Defendant-intervenors SKF USA Inc. and SKF (U.K.) Limited ("SKF") oppose Torrington's motion for a preliminary injunction. SKF requests this Court to narrow the scope of the requested preliminary injunction by ordering the U.S. Customs Service ("Customs") to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second ad-

ministrative review of the antidumping duty orders covering antifriction bearings. SKF states that it will file a letter of credit to cover the amounts released.

BACKGROUND

On June 24, 1992, the Department of Commerce, International Trade Administration ("ITA"), published the final results of the second administrative review of antifriction bearings from nine countries subject to antidumping duty orders. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992).

On July 22, 1992, Torrington filed a summons and on August 21, 1992, a complaint challenging the Final Results. On August 21, 1992, Torrington filed a motion requesting this Court to issue a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to this contested review.

On September 9, 1992, SKF's motion to intervene was granted. *The Torrington Company v. United States,* Court No. 92–07–00492 (order granting SKF's motion to intervene). On September 11, 1992, SKF filed an opposition to Torrington's motion for a preliminary injunction seeking to narrow the scope of the preliminary injunction requested by Torrington.

In essence, SKF's argument is that for a number of years it has been required to post cash deposits of estimated antidumping duties with Customs upon entry of antifriction bearings from the countries covered by the outstanding antidumping duty orders. The rates at which SKF was required to make deposits were derived from the initial less than fair value ("LTFV") investigation. *See, e.g., Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 18,997 (1989). The actual assessment rates calculated by the ITA in the challenged second administrative review are substantially lower than the rates of deposit from the LTFV investigation. *Final Results,* 57 Fed. Reg. at 28,361. SKF argues that (1) issuance of the requested preliminary injunction will deprive SKF of its due process rights by adversely affecting its property rights without prior notice and the opportunity to comment, (2) that this Court has the legal and judicial authority to modify the preliminary injunction to allow for the substitution of a letter of credit for cash deposits in excess of the rates calculated in the contested second administrative review as security pending judicial review, and (3) that it would be equitable for this Court to do so. *Defendant-intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction* at 6–31.

DISCUSSION

This Court adheres to its decision in *Federal-Mogul v. United States,* 16 CIT ____, Slip Op. 92–177 (October 14, 1992) and finds that the statu-

tory scheme is clear that release or refund of cash deposits of "estimated [antidumping] duties must await a final court decision and liquidation by the agency,in accordance with that decision." *NTN Bearing Corp. of America v. United States,* 892 F.2d 1004, 1006 (Fed. Cir. 1989); *see also Diversified Prods. Corp. v. United States,* 7 CIT 49, 581 F. Supp. 736 (1984). In addition, SKF's due process argument in this action fails because SKF had the opportunity to comment on Torrington's motion and those comments have been carefully considered by this Court. Therefore, plaintiff's motion for a preliminary injunction is granted.

(Slip Op. 92–182)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF GMBH, DEFENDANT-INTERVENORS

Court No. 92–07–00493

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review challenged in this action. Defendant-intervenors SKF USA Inc. and SKF GmbH ("SKF") oppose Torrington's motion and request this Court to narrow the scope of the preliminary injunction requested by Torrington by ordering the U.S. Customs Service to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review. SKF will file a letter of credit to cover the amounts released.

Held: Cash deposits of estimated antidumping duties cannot be released or refunded until liquidation occurs. When an administrative review is judicially challenged, liquidation cannot occur until entry of final judgment.

[Plaintiff's motion for a preliminary injunction granted.]

(Dated October 14, 1992)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Robert A. Weaver, Margaret E. O. Edozien* and *Wesley K. Caine*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marc E. Montalbine*); of counsel: *Stephen J. Claeys, Craig R. Giesze* and *Dean A. Pinkert,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco* and *Thomas Trendl*) for defendant-intervenors SKF USA Inc. and SKF GmbH.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review being challenged in this action. Defendant-intervenors SKF USA Inc. and SKF GmbH

("SKF") oppose Torrington's motion for a preliminary injunction. SKF requests this Court to narrow the scope of the requested preliminary injunction by ordering the U.S. Customs Service to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review of the antidumping duty orders covering antifriction bearings. SKF states that it will file a letter of credit to cover the amounts released.

BACKGROUND

On June 24, 1992, the Department of Commerce, International Trade Administration ("ITA"), published the final results of the second administrative review of antifriction bearings from nine countries subject to antidumping duty orders. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992).

On July 24, 1992, Torrington filed a summons and on August 21, 1992, a complaint challenging the Final Results. On August 21, 1992, Torrington filed a motion requesting this Court to issue a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to this contested review.

On September 4, 1992, SKF's motion to intervene was granted. *The Torrington Company v. United States,* Court No. 92–07–00493 (order granting SKF's motion to intervene). On September 11, 1992, SKF filed an opposition to Torrington's motion for a preliminary injunction seeking to narrow the scope of the preliminary injunction requested by Torrington.

In essence, SKF's argument is that for a number of years it has been required to post cash deposits of estimated antidumping duties with Customs upon entry of antifriction bearings from the countries covered by the outstanding antidumping duty orders. The rates at which SKF was required to make deposits were derived from the initial less than fair value ("LTFV") investigation. *See, e.g., Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 18,997 (1989). The actual assessment rates calculated by the ITA in the challenged second administrative review are substantially lower than the rates of deposit from the LTFV investigation. *Final Results,* 57 Fed. Reg. at 28,361. SKF argues that (1) issuance of the requested preliminary injunction will deprive SKF of its due process rights by adversely affecting its property rights without prior notice and the opportunity to comment, (2) that this Court has the legal and judicial authority to modify the preliminary injunction to allow for the substitution of a letter of credit for cash deposits in excess of the rates calculated in the contested second administrative review as security pending judicial review, and (3) that it would be equitable for this

Court to do so. *Defendant-intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction* at 6–31.

DISCUSSION

This Court adheres to its decision in *Federal-Mogul v. United States*, 16 CIT ____, Slip Op. 92–177 (October 14, 1992) and finds that the statutory scheme is clear that release or refund of cash deposits of "estimated [antidumping] duties must await a final court decision and liquidation by the agency in accordance with that decision." *NTN Bearing Corp. of America v. United States*, 892 F.2d 1004, 1006 (Fed. Cir. 1989); *see also Diversified Prods. Corp. v. United States*, 7 CIT 49, 581 F. Supp. 736 (1984). In addition, SKF's due process argument in this action fails because SKF had the opportunity to comment on Torrington's motion and those comments have been carefully considered by this Court. Therefore, plaintiff's motion for a preliminary injunction is granted.

(Slip Op. 92–183)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT AND SKF USA INC. AND SKF SVERIGE, AB, DEFENDANT-INTERVENORS

Court No. 92–07–00494

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review challenged in this action. Defendant-intervenors SKF USA Inc. and SKF Sverige, AB ("SKF") oppose Torrington's motion and request this Court to narrow the scope of the preliminary injunction requested Torrington by ordering the U.S. Customs Service to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent these cash deposits are in excess of the cash deposit rates calculated in the second administrative review. SKF will file a letter of credit to cover the amounts released.

Held: Cash deposits of estimated antidumping duties cannot be released or refunded until liquidation occurs. When an administrative review is judicially challenged, liquidation cannot occur until entry of final judgment.

[Plaintiff's motion for a preliminary injunction granted.]

(Dated October 14, 1992)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Robert A. Weaver, Margaret E. O. Edozien* and *Wesley K. Caine*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marc E. Montalbine*); of counsel: *Stephen J. Claeys, Craig R. Giesze* and *Dean A. Pinkert*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco* and *Thomas Trendl*) for defendant-intervenors SKF USA Inc. and SKF Sverige, AB.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 7 and 65(a) of the Rules of this Court

for a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to the administrative review being challenged in this action. Defendant-intervenors SKF USA Inc. and SKF Sverige, AB ("SKF") oppose Torrington's motion for a preliminary injunction. SKF requests this Court to narrow the scope of the requested preliminary injunction by ordering the U.S. Customs Service ("Customs") to release SKF's cash deposits of estimated antidumping duties on entries of antifriction bearings subject to this action to the extent those cash deposits are in excess of the cash deposit rates calculated in the second administrative review of the antidumping duty orders covering antifriction bearings. SKF states that it will file a letter of credit to cover the amounts released.

BACKGROUND

On June 24, 1992, the Department of Commerce, International Trade Administration ("ITA"), published the final results of the second administrative review of antifriction bearings from nine countries subject to antidumping duty orders. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992).

On July 22, 1992, Torrington filed a summons and on August 21, 1992, a complaint challenging the Final Results. On August 21, 1992, Torrington filed a motion requesting this Court to issue a preliminary injunction enjoining liquidation of entries of antifriction bearings subject to this contested review.

On September 9, 1992, SKF's motion to intervene was granted. *The Torrington Company v. United States,* Court No. 92–07–00494 (order granting SKF's motion to intervene). On September 11, 1992, SKF filed an opposition to Torrington's motion for a preliminary injunction seeking to narrow the scope of the preliminary injunction requested by Torrington.

In essence, SKF's argument is that for a number of years it has been required to post cash deposits of estimated antidumping duties with Customs upon entry of antifriction bearings from the countries covered by the outstanding antidumping duty orders. The rates at which SKF was required to make deposits were derived from the initial less than fair value ("LTFV") investigation. *See, e.g., Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 18,997 (1989). The actual assessment rates calculated by the ITA in the challenged second administrative review are substantially lower than the rates of deposit from the LTFV investigation. *Final Results,* 57 Fed. Reg. at 28,361. SKF argues that (1) issuance of the requested preliminary injunction will deprive SKF of its due process rights by adversely affecting its property rights without prior notice and the opportunity to comment, (2) that this Court has the legal and judicial authority to modify the preliminary injunction to al-

low for the substitution of a letter of credit for cash deposits in excess of the rates calculated in the contested second administrative review as security pending judicial review, and (3) that it would be equitable for this Court to do so. *Defendant-intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction* at 6–31.

DISCUSSION

This Court adheres to its decision in *Federal-Mogul v. United States*, 16 CIT ____, Slip Op. 92–177 (October 14, 1992) and finds that the statutory scheme is clear that release or refund of cash deposits of "estimated [antidumping] duties must await a final court decision and liquidation by the agency in accordance with that decision." *NTN Bearing Corp. of America v. United States*, 892 F.2d 1004, 1006 (Fed. Cir. 1989); *see also Diversified Prods. Corp. v. United States*, 7 CIT 49, 581 F. Supp. 736 (1984). In addition, SKF's due process argument in this action fails because SKF had the opportunity to comment on Torrington's motion and those comments have been carefully considered by this Court. Therefore, plaintiff's motion for a preliminary injunction is granted.

U.S. COURT OF INTERNATIONAL TRADE,
OFFICE OF THE CLERK,
New York, N.Y., October 15, 1992.

NOTICE OF AMENDMENTS TO THE RULES OF THE
UNITED STATES COURT OF INTERNATIONAL TRADE

The court, on September 25, 1992, approved certain amendments to the Rules of the United States Court of International Trade, which will become effective January 1, 1993. The Rules affected by these changes are: Rules 3, 7, 8, 12, 15, 24, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 56.1, 56.2, 75, 77, 79, 82, 83, 84, 85, 86 and 89.

Copies of the amendments were transmitted to the following sources for publication:

Matthew Bender & Co.
International Business Reports (Customs Record)
Gould Publications
Lawyers Co-operative Publishing Co.
Oceana Publications, Inc.
Office of the Law Revision Counsel (United States Code)
Rules Service Company
United States Customs Service
West Publishing Company (United States Code Annotated)

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JOSEPH E. LOMBARDI,
Clerk of the Court.

United States Court of International Trade

Chief Judge

[~~Edward D. Re~~]
Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
[~~Dominick L. DiCarlo~~]
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

[~~Morgan Ford~~]
James L. Watson
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
[~~Nils A. Boe~~]

Amendments to Rules 3, 7, 8, 12, 15, 24, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 56.1, 56.2, 75, 77, 79, 82, 83, 84, 85, 86 and 89

September 25, 1992

Effective date:
January 1, 1993

Rules of the United States Court of International Trade

EFFECTIVE NOVEMBER 1, 1980
(AS AMENDED, [~~MARCH 1, 1991~~] JANUARY 1, 1993)

Amendments to Rule 3

Rule 3 is amended as follows:

RULE 3. COMMENCEMENT OF ACTION.

(a) *Commencement.* * * *

(1) * * *

(2) An action described in 28 U.S.C. § 1581 (c) to contest a determination listed in section 516A(a)(2) or (3) of the Tariff Act of 1930. [*]

(b) *Filing Fee.* * * *

(c) *Information Statement.* * * *

(d) *Amendment of Summons.* * * *

(e) *Notice to Interested Parties.* In an action described in 28 U.S.C. § 1581 (c), the plaintiff, as provided in section 516A(d) of the Tariff Act of 1930, shall notify every interested party who was a party to the administrative proceeding of the commencement of the action, by mailing a copy of the summons at the time the action is commenced, or promptly thereafter, by certified or registered mail, return receipt requested, to each such party at the address last known in the administrative proceeding.

Upon filing of a complaint in an action described in 28 U.S.C. § 1581(c), the plaintiff shall promptly serve a copy of the complaint, by certified or registered mail, return receipt requested, on every interested party who was a party to the administrative proceeding at the address last known in that proceeding.

(f) *Precedence of Action.* * * *

PRACTICE COMMENT: * * *
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PRACTICE COMMENT: * * *
PRACTICE COMMENT: * * *

PRACTICE COMMENT: As provided in Section 516A(a)(2) and (3) of the Tariff Act of 1930, a complaint shall be filed within 30 days after the filing of the summons. *See Georgetown Steel v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

Nevertheless, counsel are encouraged to commence any action described in Section 516A(a)(2) or (3) of the Tariff Act of 1930 and 28 U.S.C. § 1581(c) by the concurrent filing of a summons and complaint. This will serve to expedite the prosecution of the action.

When an action is commenced, counsel should contact the Clerk's Office not more than 24 hours prior to filing to obtain a court number and shall endorse

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[~~* PRACTICE COMMENT: As provided in Section 516A(a)(2) of the Tariff Act of 1930, a complaint shall be filed within 30 days after the filing of the summons. *See Georgetown Steel v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).~~]

that court number on the summons and complaint. Counsel for plaintiff shall be responsible for service of the summons and complaint as prescribed in Rules 4(b), (c), (d) and (e). Under these circumstances, the clerk of the court will not make service of the summons as prescribed in Rule 4(a)(4).

(As amended Nov. 4, 1981, eff. Jan. 1, 1982; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 7

Rule 7 is amended as follows:

RULE 7. PLEADINGS ALLOWED – CONSULTATION – ORAL ARGUMENT – RESPONSE TIME – SHOW CAUSE ORDER – FORM OF MOTIONS

(a) *Pleadings.* There shall be a complaint and, **except for an action described in 28 U.S.C. § 1581(c),** an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) *Motions – Consultation.* Before a motion for an extension of time as prescribed in Rule 6(b), **a motion for intervention as prescribed in Rule 24(a), a motion for a preliminary injunction to enjoin the liquidation of entries or a motion for a judicial protective order as prescribed in Rule 56.2(a), a motion for a hearing as prescribed in Rule 56.2(e), a motion for the designation of a test case or suspension as prescribed in Rule 84,** or a motion for an order compelling discovery as prescribed in Rule 37(a), is made, the moving party shall consult with [~~opposing counsel~~] **all other parties to the action** to attempt to reach agreement, in good faith, on the issues involved in the motion. If the court finds that [~~counsel~~] **a party** willfully refused to consult, or, having consulted, willfully refused to attempt to reach agreement in good faith, the court may impose such sanctions as it deems proper.

(c) *Oral Argument.* * * *

(d) *Time To Respond.* * * *

(e) *Order To Show Cause.* * * *

(f) *Form of Motions and Other Papers.* * * *

(1) * * *
(2) * * *
(3) * * *

(g) *Dispositive Motions Defined.* * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: When a party is seeking a preliminary injunction, counsel shall, at least 24 hours prior to the filing of motion papers, notify the Case Management Section of the Clerk's Office at 212–264–2971. When a preliminary injunction is sought in conjunction with the filing of a new action, counsel shall, before making service of the pleadings and the motion, obtain a court number from the Case Management Section and endorse it on the pleadings and the motion.

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; Oct. 3, 1990, eff. Jan. 1, 1991; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 8

Rule 8 is amended as follows:

RULE 8. GENERAL RULES OF PLEADING

(a) *Claims for Relief.* * * *
(b) *New Grounds.* * * *
(c) *Defenses – Form of Denials.* * * *
(d) *Affirmative Defenses.* * * *
(e) *Effect of Failure to Deny.* * * *
(f) *Pleading To Be Concise and Direct – Consistency.* * * *

(1) * * *
(2) * * *

(g) *Construction of Pleadings.* * * *

PRACTICE COMMENT: For an action described in 28 U.S.C. § 1581(c), the complaint shall contain: (1) a citation to the administrative determination to be reviewed, (2) a statement of the issues presented by the action and (3) a demand for judgment.

(As amended, July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 12

Rule 12 is amended as follows:

RULE 12. DEFENSES AND OBJECTIONS – WHEN AND HOW PRESENTED – BY PLEADING OR MOTION – MOTION FOR JUDGMENT ON THE PLEADINGS

(a) *When Presented.* The United States, or an officer or agency thereof, shall serve an answer to the complaint, or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, of the pleading in which the claim is asserted; except that, **(1) in an action described in 28 U.S.C. § 1581(c), no answer shall be served or filed, and (2)** in an action described in 28 U.S.C. § 1581(f), involving an application for an order to make confidential information available under section 777(c)(2) of the Tariff Act of 1930, the answer shall be served within 10 days after the service of the summons and complaint. For good cause shown, the court in any action may order a different period of time.

Any other defendant shall serve an answer within 20 days after the service of the complaint upon that defendant. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after the notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) *How Presented.* * * *
(c) *Motion for Judgment on the Pleadings.* * * *
(d) *Preliminary Hearings.* * * *
(e) *Motion for More Definite Statement.* * * *
(f) *Motion To Strike.* * * *
(g) *Consolidation of Defenses in Motion.* * * *
(h) *Waiver or Preservation of Certain Defenses.*

(1) * * *
(2) * * *
(3) * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 15

Rule 15 is amended as follows:

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) *Amendments.* * * *

(b) *Amendments To Conform to the Evidence.* * * *

[~~(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The delivery or mailing of the summons and complaint to the Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clause (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.~~]

(c) *Relation Back of Amendments.* An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4 for service of the pleadings commencing the action, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of the pleadings commencing the action to the Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) *Supplemental Pleadings.* * * *

(As amended, eff. Jan. 1, 1982; July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 24

Rule 24 is amended as follows:

RULE 24. INTERVENTION

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In an action described in 28 U.S.C. § 1581(c), a timely application shall be made no later than 30 days after the date of service of the complaint as provided for in Rule 3(e), unless for good cause shown at such later time for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; or (2) under circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30-day period.

(b) *Permissive Intervention.* * * *

(c) *Procedure.* **Except in an action described in 28 U.S.C. § 1581(c), a** [A] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. **When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.**

In an action described in 28 U.S.C. § 1581(c), an interested party who was a party to the proceeding in connection with which the matter arose and who desires to intervene pursuant to subparagraph (a) shall, after consultation in accordance with Rule 7(b), serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state (1) whether the application for intervention has been consented to by the parties, and (2) the grounds in support of the motion. When the applicant for intervention seeks to intervene on the side of the plaintiff, the motion shall state the applicant's standing, and shall state the administrative determination to be reviewed and issues that the intervenor desires to litigate. When the applicant for intervention seeks to intervene on the side of the defendant, the motion shall state the applicant's standing. If no objection has been filed within 10 days after service of the motion, or if the motion has been consented to by all of the parties, the clerk of the court may order the requested relief.

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993**.)

Amendments to Rule 34

Rule 34 is amended as follows:

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) *Scope.* * * *

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after filing of the complaint and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected [~~by~~] either **by** individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) *Persons Not Parties.* A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan 1, 1993.**)

Amendments to Rule 35

Rule 35 is amended as follows:

RULE 35. PHYSICAL AND MENTAL EXAMINATIONS OF PERSONS

(a) *Order for Examination.* When the mental or physical condition (including the blood group) of a party[,] or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a [~~physician~~] **suitably licensed or certified examiner** or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of* [~~*Examining Physician*~~] ***Examiner.***

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the [~~requestor~~] **requesting party** a copy of [a] **the** detailed written report of the [~~examining physician~~] **examiner** setting out the [~~physician's~~] **examiner's** findings, including the results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that [~~such~~] **the** party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just[;], and if [~~a physician~~] **an examiner** fails or refuses to make a report, the court may exclude the [~~physician's~~] **examiner's** testimony if offered at [the] trial.

(2) * * *

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an [~~examining physician~~] **examiner** or the taking of a deposition of [~~the physician~~] **an examiner** in accordance with the provisions of any other rule.

(As amended July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993**.)

Amendments to Rule 41

Rule 41 is amended as follows:

RULE 41. DISMISSAL OF ACTIONS

(a) *Voluntary Dismissal – Effect Thereof.*

(1) By Plaintiff – By Stipulation. Subject to the provisions of Rule 23(e), **of Rule 56.2,** of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (A) by filing a notice of dismissal which shall be substantially in the form set forth in Form 7 of the Appendix of Forms at any time before service by the adverse party of an answer or motion for summary judgment, whichever occurs first, or (B) by filing a stipulation of dismissal, which shall be substantially in the form set forth in Form 8 of the Appendix of Forms, signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. * * *

(b) *Involuntary Dismissal – Effect Thereof.*

(1) Actions on the Reserve Calendar or the Suspension Disposition Calendar [~~or the Joined Issue Calendar~~] are subject to dismissal for lack of prosecution at the expiration of the applicable period of time as prescribed by

Rules 83[,] **and** 85 [~~and 86~~].

(2) * * *

(3) * * *

(4) * * *

(c) *Insufficiency of Evidence.* * * *

(d) *Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.* * * *

(e) *Costs of Previously Dismissed Action.* * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993**.)

Amendments to Rule 44

Rule 44 is amended as follows:

RULE 44. PROOF OF OFFICIAL RECORD

(a) *Authentication.*

(1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, [~~territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands~~] **or within a territory subject to the administrative or judicial jurisdiction of the**

United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may he made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position [~~(A)~~]**(i)** of the attesting person, or [~~(B)~~]**(ii)** of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, [~~(A)~~]**(i)** admit an attested copy without final certification or [~~(B)~~]**(ii)** permit the foreign official record to be evidenced by an attested summary with or without a final certification. **The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.**

(b) *Lack of Record.* * * *

(c) *Other Proof.* * * *

(As amended July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993**.)

Amendments to Rule 45

Rule 45 is amended as follows:

RULE 45. SUBPOENA

[~~(a) *For Attendance of Witnesses Form Issuance.* Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.~~

~~(b) *For Production of Documentary Evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.~~

~~(c) *Service.* A subpoena may be served by a United States marshal, by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.~~

~~(d) Subpoena for Taking Depositions—Place of Examination.~~

~~(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for issuance by the clerk of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books,~~

~~papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.~~

~~The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.~~

~~(2) A person to whom a subpoena for the taking of a deposition is directed may be required to attend at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.~~

~~(c) *Subpoena for a Hearing or Trial.*~~

~~(1) At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefore, or when the interest of justice may require, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.~~

~~(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in 28 U.S.C. § 1783.~~

~~(f) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of court.~~]

(a) *Form; Issuance.*

(1) Every subpoena shall

(A) state the name of the court; and

(B) state the title of the action, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the test of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court. A subpoena for attendance at a deposition shall issue from the court. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice before the Court of International Trade as an officer of the court may also issue and sign a subpoena on behalf of the court.

(b) *Service.*

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the sub-

poena. When a statute of the United States provides therefore, or when the interest of justice may require, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) *Protection of Persons Subject to Subpoenas.*

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for desposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) *Duties in Responding to Subpoena.*

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

(As amended June 19, 1985, eff. Oct. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1990, eff. Jan. 1, 1991; **Sept. 25, 1992, eff. Jan. 1, 1993**.)

Amendments to Rule 47

Rule 47 is amended as follows:

RULE 47. JURORS

[~~(a) *Number of Jurors.* A jury shall consist of six persons, unless a greater number is specified in the local rules of the district court for the judicial district in which the case is to be tried.~~]

[~~(b)~~] **(a)** *Examination of Jurors.* The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

[~~(c) *Alternate Jurors.* The court may direct that not more than four jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.~~]

(b) *Peremptory Challenges.* The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) *Excuse.* The court may for good cause excuse a juror from service during trial or deliberation.

(As amended July 21, 1986, eff. Oct. 1, 1986; **Sept. 25, 1992, eff. Jan. 1, 1993**.)

Amendments to Rule 48

Rule 48 is amended as follows:

RULE 48. [STIPULATION AS TO JURIES MAJORITY VERDICT] **NUMBER OF JURORS – PARTICIPATION IN VERDICT**

[The parties may stipulate that the jury shall consist of any number less than the number of jurors otherwise required under Rule 47(a), or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.]

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the Verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

(As amended July 21, 1986, eff. Oct. 1, 1986; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 50

Rule 50 is amended as follows:

[RULE 50. MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) *Motion for Directed Verdict When Made Effect.* A party who moves for a directed verdict at the close of evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefore. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 30 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned, such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Motion for Judgment Notwithstanding the Verdict – Conditional Rulings on Grant of Motion.*

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 30 days after entry of the judgment notwithstanding the verdict.

~~(d) *Motion for Judgment Notwithstanding the Verdict-Denial of Motion.*~~

~~If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that this court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing this court to determine whether a new trial shall be granted.~~

~~PRACTICE COMMENT: Rule 50(b) permits a party simultaneously to move for a new trial and for judgment notwithstanding the verdict. The time for filing a motion for a new trial in the court, 30 days, is governed by 28 U.S.C. § 2646. To avoid confusion and inefficiency, Rule 50(b) provides the same 30 day filing period for any motion filed thereunder. In contrast, Rule 50(b) of the Federal Rules of Civil Procedure provides a 10 day period. However, motions for new trials in courts in which the Federal Rules of Civil Procedure apply are not subject to 28 U.S.C. § 2646.~~

~~PRACTICE COMMENT: Rule 50(c)(2) provides a 30 day period within which to move for a new trial pursuant to Rule 59. The corresponding period provided by Rule 50(c)(2) of the Federal Rules of Civil procedure is 10 days. The lengthier period to file such a motion in the court is mandated by 28 U.S.C. § 2646.]~~

RULE 50. JUDGMENT AS A MATTER OF LAW IN ACTIONS TRIED BY JURY; ALTERNATIVE MOTION FOR NEW TRIAL; CONDITIONAL RULINGS

(a) *Judgment as a Matter of Law.*

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third-party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) *Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial.* Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of a legal questions raised by the motions. Such a motion may be renewed by service and filing not later than 30 days after the entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) *Same: Conditional Rulings on Grant of Motion for Judgment as a Matter of Law.*

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the

order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 30 days after entry of the judgment.

(d) *Same: Denial of Motion for Judgment as a Matter of Law.* If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

PRACTICE COMMENT: Rule 50 has been amended to conform to the new Rule 50 under the Federal Rules of Civil Procedure, which went into effect on December 1, 1991. The time for filing a motion for a new trial in the court, 30 days, is governed by 28 U.S.C. § 2646. To avoid confusion and inefficiency, Rule 50(b) provides the same 30-day filing period for any motion filed thereunder. In contrast, Rule 50(b) of the Federal Rules of Civil Procedure, provides a 10-day period. However, motions for new trials in courts in which the Federal Rules of Civil Procedure apply are not subject to 28 U.S.C. § 2646. The same comment is applicable to Rule 50(c)(2).

(As amended July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1990, eff. Jan. 1, 1991; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 52

Rule 52 is amended as follows:

RULE 52. FINDINGS BY THE COURT; **JUDGMENT ON PARTIAL FINDINGS**

(a) *Effect.* * * *

(b) *Amendment.* * * *

(c) *Judgment on Partial Findings.* If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; June 19, 1985, eff. Oct. 1, 1985; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 53

Rule 53 is amended as follows:

RULE 53. MASTERS

(a) *Appointment and Compensation.* * * *
(b) *Reference.* * * *
(c) *Powers.* * * *
(d) *Proceedings.*

(1) *Meetings.* * * *
(2) *Witnesses.* * * *
(3) *Statement of Accounts.* * * *

(e) *Report.*

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and **serve on all parties notice of the filing.** [~~in~~] **In** an action to be tried without a jury, unless otherwise directed by the order of reference, **the master** shall file with [~~it~~] **the report** a transcript of the proceedings and of the evidence and the original exhibits. [~~The clerk shall forthwith mail to all parties notice of the filing.~~] **Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.**
(2) In Non-Jury Actions. * * *
(3) In Jury Actions. * * *
(4) Stipulation as to Findings. * * *
(5) Draft Report. * * *

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988**; Sept. 25, 1992, eff. Jan 1, 1993**.)

Amendments to Rule 56.1

Rule 56.1 is amended as follows:

RULE 56.1 – JUDGMENT UPON AN AGENCY RECORD **FOR AN ACTION OTHER THAN THAT DESCRIBED IN 28 U.S.C. § 1581(c)**

(a) *Motion for Judgment.* * * *
(b) *Cross-Motions.* * * *
(c) *Briefs.* * * *

(1) * * *
(2) * * *

(d) *Time to Respond.* * * *
(e) *Hearing.* * * *
(f) *Partial Judgment.* * * *
PRACTICE COMMENT: * * *
PRACTICE COMMENT: * * *

(As amended Oct. 3, 1984, eff. Jan. 1, 1985**; Sept. 25, eff. Jan. 1, 1993**.)

New Rule 56.2

New Rule 56.2 is as follows:

RULE 56.2 JUDGMENT UPON AN AGENCY RECORD FOR AN ACTION DESCRIBED IN 28 U.S.C. § 1581(c)

(a) *Proposed Briefing Schedule and Joint Status Report.* The judge may modify the following procedures as appropriate in the circumstances of the action, or the parties may suggest modification of these procedures.

Any proposed judicial protective order shall be filed within 30 days after the date of service of the complaint. Prior to the filing of the proposed judicial protective order, the moving party shall consult with all other parties to the action in accordance with Rule 7(b) regarding the terms and conditions of the proposed judicial protective order.

Any motion to intervene as of right shall be filed within the time and in the manner prescribed by Rule 24.

Any motion for a preliminary injunction to enjoin the liquidation of entries that are the subject of the action shall be filed within 30 days after the date of service of the complaint, or at such later time, for good cause shown. Prior to the filing of the motion, the moving party shall consult with all other parties to the action in accordance with Rule 7(b).

No later than 30 days after the filing of the record with the court, the parties, including proposed intervenors, shall file with the clerk (1) a Joint Status Report, and (2) a proposed briefing schedule. The Joint Status Report shall be signed by counsel for all parties and shall set forth answers to the following questions, although separate views may be set forth on any point on which the parties cannot agree:

1. Does the court have jurisdiction over the action?

2. Should the case be consolidated with any other case, or should any portion of the case be severed, and the reasons therefore?

3. Should further proceedings in this case be deferred pending consideration of another case before the court or any other tribunal and the reasons therefore?

4. Are there any outstanding issues concerning the issuance of a judicial protective order?

5. Is there any other information of which the court should be aware at this time?

The proposed briefing schedule shall indicate whether the parties (1) agree to the time periods set forth in Rule 56.2(d), (2) agree to time periods other than the periods set forth in Rule 56.2(d), or (3) cannot agree upon a time period. In the event the parties cannot agree upon a time period, the parties shall indicate the areas of disagreement and shall set forth the reasons for their respective positions.

After the Joint Status Report and proposed briefing schedule are filed, the judge promptly shall enter a scheduling order.

(b) *Cross-motions.* When a motion for judgment upon an agency record is filed by a party, an opposing party shall not file a cross-motion for judgment upon an agency record. If the court determines that judgment should be entered in favor of an opposing party, it may enter judgment in favor of that party, notwithstanding the absence of a cross-motion.

(c) *Briefs.*

(1) In addition to the other requirements prescribed by these rules, the briefs submitted on the motion, either contesting or supporting the agency determination, shall include a statement setting forth in numbered paragraphs:

(A) the administrative determination sought to be reviewed with appropriate reference to the Federal Register; and

(B) the issues of law presented together with the reasons for contesting or supporting the administrative determination, specifying how the determination may be arbitrary, capricious, an abuse of dis-

cretion, not otherwise in accordance with law, unsupported by substantial evidence; or, how the determination may be unwarranted by the facts to the extent that the agency may or may not have considered facts which, as a matter of law, should have been properly considered.

(2) The brief shall include the authorities relied upon and the conclusions of law deemed warranted by the authorities. All references to the administrative record shall be made by citing the portions of the record to the factual or legal issues raised. Citations shall be by page number of the transcript, if any, and by specific identification of exhibits together with the relevant page number. The brief also shall include a table of contents, a table of authorities and an appendix containing a copy of those portions of the record cited in the brief.

(d) *Time to Respond.* Unless the scheduling order otherwise provides, a motion for judgment upon an agency record shall be served within 60 days after the date of service of the scheduling order. Responsive briefs shall be served within 60 days after the date of service of the brief of the moving party. The moving party shall have 25 days after service of the response to the motion to serve a reply. No other papers or briefs shall be allowed, except by leave of court.

(e) *Hearing.* Upon motion of a party, subject to the time limitations set forth in Rule 7(c), or upon its own initiative, the court may direct oral argument on a motion for judgment upon an agency record at a time and place designated in Rule 77(c). The moving party, after consultation with all other parties to the action, shall request a hearing date that is not more than 30 days after the date of service of the reply memorandum, except for good cause shown as to why the hearing should be scheduled on a later date.

(f) *Partial Judgment.* After considering a motion filed under this rule, the court may grant judgment in whole or in part in favor of any party.

(g) *Voluntary Dismissal – Time Limitation.* In an action described in 28 U.S.C. § 1581(c), a plaintiff desiring to voluntarily dismiss its action in accordance with Rule 41(a)(1)(A), shall file a notice of dismissal within 30 days after the date of service of the complaint. In the event plaintiff desires to dismiss its action more than 30 days after the date of service of the complaint, a stipulation of dismissal shall be filed in accordance with Rule 41(a)(1)(B), or if circumstances warrant intervention by the court, in accordance with Rule 41(a)(2).

(Added Sept. 25, 1992, eff. Jan. 1, 1993.)

Amendments to Rule 75

Rule 75 is amended as follows:

RULE 75. PRACTICE – APPEARANCE – SUBSTITUTION OF ATTORNEYS – WITHDRAWAL OF ATTORNEY – NOTIFICATION OF CHANGES

(a) *Practice.* * * *

(b) *Appearances.* * * *

(1) Except for an individual (not a corporation, partnership, organization or other legal entity) appearing *pro se*, each party and *amicus curiae* must appear through an attorney authorized to practice before the court. [~~If a summons, pleading or other paper provided for in these rules bears the name, address and telephone number of a member of the bar of this court~~] **When a summons contains the name, address and telephone number of an attorney,** the attorney shall be recognized as the attorney of record and no separate notice of appearance shall be required of the attorney. Provided, however, that an attorney representing the United States, or an agency or officer thereof, who is not otherwise admitted to practice before the court, shall serve a separate notice of appearance as prescribed by paragraph (2) of this subdivision.

(2) * * *

(c) *Substitution of Attorneys.* * * *

(d) *Withdrawal of Attorney.* * * *

(e) *Notification of Changes.* Whenever there is any change in the name of an attorney of record, the attorney's address or telephone number, [~~prompt written notice~~] **a new notice of appearance for each action** shall be **promptly** served upon the other parties **and filed with the court. The notice shall be substantially in the form as set forth in Form 11 of the Appendix of Forms. Unless and until an attorney of record files a new notice of appearance as prescribed in this subdivision, service of all papers shall be made upon the attorney of record at the last known address.**

(As amended July 21, 1986, eff. Oct. 1, 1986; July 20, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 77

Rule 77 is amended as follows:

RULE 77. SESSIONS OF THE COURT

(a) *Court Always Open.* * * *

(b) *Trials and Proceedings – Orders in Chambers.* * * *

(c) *Place of Trials or Hearings.* * * *

(1) * * *

(2) * * *

(3) * * *

(d) *Photography, Tape Recording and Broadcasting.* * * *

(e) *Assignment and Reassignment of Actions.* * * *

(1) * * *

(2) * * *

(3) Time of Assignment. [~~Actions shall be assigned by the chief judge as follows: in an action commenced under 28 U.S.C. § 1581(a) or (b), upon a request for trial or submission of a dispositive motion; in all other actions, upon joinder of issue or submission of a dispositive motion; or in any action, at any time, upon motion for good cause shown or upon the chief judge's own initiative.~~] **An action shall be assigned by the chief judge at any time upon the chief judge's own initiative or upon motion for good cause shown.**

(4) * * *

[~~(5) *Disability of a Judge.* If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of facts and conclusions of law are filed, then the action may be reassigned by the chief judge to another judge who may perform those duties; but if the other judge is satisfied that such other judge cannot perform those duties because such other judge did not preside at the trial or for any other reason, such other judge may in such other judge's discretion grant a new trial.~~]

(5) *Inability of a Judge to Proceed.* If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the action may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

(f) *Judge and Court – Defined.* * * *

PRACTICE COMMENT: * * *

(As amended Apr. 28, 1987, eff. June 1, 1987; July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 79

Rule 79 is amended as follows:

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) *Civil Docket.* * * *

(b) *Judgments and Orders.* * * *

(c) *Notices of Orders or Judgments.*

~~[(1) Upon the entry of a judgment, the clerk shall, by delivery or by mailing, serve upon each party and, if appropriate, the district director of the customs district in which the action arose, a notice of entry of the judgment, together with a copy of the judgment, opinion, decision, or findings of fact and conclusions of law upon which it is based.]~~

(1) Immediately upon the entry of an order the clerk shall serve a notice of the entry, together with a copy of the order and any accompanying memorandum, by delivery or mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the delivery or mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

~~[(2) Upon the entry of an order, the clerk shall serve upon each party, by delivery or by mailing, a notice of entry of the order, together with a copy of the order and any accompanying memorandum.]~~

(2) Immediately upon the entry of a judgment the clerk shall serve a notice of the entry, together with a copy of the judgment, opinion, decision, or findings of fact and conclusions of law upon which it is based, by delivery or mail in the manner provided for in Rule 5 upon each party who is not default for failure to appear, and, if appropriate, the district director of the customs district in which the action arose, and shall make a note in the docket of the delivery or mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

(3) * * *

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 82

Rule 82 is amended as follows:

RULE 82. CLERK'S OFFICE AND ORDERS BY THE CLERK

(a) *Business Hours and Address.* * * *

(b) *Motions, Orders and Judgments.* The clerk may dispose of the following types of motions and sign the following types of orders and judgments without submission to the court, but the clerk's action may be suspended, altered or rescinded by the court for good cause shown:

(1) Motions on consent in unassigned cases extending the time within which to plead, move or respond.

(2) Motions on consent in unassigned cases for the discontinuance or dismissal of the action.

(3) Orders of dismissal upon notice as prescribed by Rules 41(a)(1) and 41(b)(2).

~~[(4) Stipulated judgments on agreed statements of facts as prescribed by Rule 58.1.]~~

[~~(5)~~**(4)** Orders of dismissal for lack of prosecution as prescribed by Rules (83(c)[,] **and** 85(d)[~~, and 86(b)~~].

(5) Consent motions to intervene as of right made within the 30–day period provided in Rule 24(a).

(c) *Clerk—Definition.* * * *

(d) *Filing of Papers.* * * *

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; June 19, 1985, eff. Oct. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 83

Rule 83 is amended as follows:

RULE 83. RESERVE CALENDAR

(a) *Reserve Calendar.* A Reserve Calendar is established on which [~~any~~] ***an*** action **described in 28 U.S.C. § 1581(a) or (b) is** commenced by the filing of a summons shall be placed when the action is commenced. An action may remain on the Reserve Calendar for [a] **an** [12] **18**-month period. The applicable [12] **18**-month period shall run from the last day of the month in which the action is commenced until the last day of the [~~12~~] **18**th month thereafter.

(b) *Removal.* * * *

(c) *Dismissal for Lack of Prosecution.* An action not removed from the Reserve Calendar within the [~~12~~] **18**-month period shall be dismissed for lack of prosecution and the clerk shall enter an order of dismissal without further direction from the court unless a motion is pending. If a pending motion is denied and less than 10 days remain in which the action may remain on the Reserve Calendar, the action shall remain on the Reserve Calendar for 10 days from the date of entry of the order denying the motion.

[~~(d) *Notice.* At least 30 days prior to the expiration of the 12 month period, the clerk shall notify the parties in writing that the action shall be dismissed in accordance with subdivision (c) of this rule unless removed from the Reserve Calendar within the applicable time period.~~]

(d) *Extension of Time.* For good cause shown why the action was not removed within the 18-month period, the court may grant an extension of time for the action to remain on the Reserve Calendar. A motion for an extension of time shall be made at least 30 days prior to the expiration of the 18-month period.

(As amended Oct. 3, 1983, eff. Jan. 1, 1985; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 84

Rule 84 is amended as follows:

RULE 84. SUSPENSION CALENDAR

(a) *Suspension Calendar.* * * *

(b) *Test Case Defined.* **A test case is an action, selected from a number of other pending actions all involving a significant issue of fact or question of law that is the same, and which is intended to proceed first to final determination to serve as a test of the right to recovery in the other actions.** A test case [~~is one which [(1)]~~ has been] **may be** so designated by order of the court upon a motion for test case designation [~~made~~] after issue is joined [~~; or (2) has been submitted to the court for decision~~].

(c) *Motion for Test Case Designation.* A party who intends that an action be designated a test case shall: (1) consult with all other parties to the action in accordance with Rule 7(b), and (2) serve upon the other parties, and file with the court a motion requesting such designation. The motion for test case designation shall include a statement that the party: (1) intends to actively prosecute the test case once designated, and (2) has other actions pending before the court that involve the same significant issue of fact or question of law as is involved in the test case and that it will promptly suspend under the test case. In any instance in which the consent of all other parties has not been obtained, a non-consenting party shall serve and file its response within 10 days after service of the motion for test case designation, setting forth its reasons for opposing.

(d)[~~(c)~~] *Suspension Criteria.* An action may be suspended under a test case if the action involves [~~an~~] **a significant** issue of fact or question of law which is [~~to be~~] the same as [~~an~~] **a significant** issue of fact or question of law involved in the test case.

(e)[~~(d)~~] *Motion for Suspension.* A motion for suspension shall include, in addition to the requirements of Rule 7, (1) the title and court number of the action for which suspension is

requested, (2) the title and court number of the test case, and (3) a [~~concise~~] statement of the **significant** issue of fact or question of law alleged to be the same in both actions.

(f)[~~(e)~~] *Time.* * * *

(g)[~~(f)~~] *Effect of Suspension.* * * *

(h)[~~(g)~~] *Removal From Suspension.* * * *

(As amended Sept. 25, 1992, eff. Jan. 1, 1993.)

Amendment to Rule 85

Rule 85 is amended as follows:

RULE 85. SUSPENSION DISPOSITION CALENDAR

(a) *Suspension Disposition Calendar.* * * *

(b) *Time—Notice.* [~~An action may remain on the Suspension Disposition Calendar for a period to be established by the judge to whom the action was assigned, or by the judge who decided the test case. This period shall not exceed 18 months from the time the action is placed on the Suspension Disposition Calendar.~~] **The court shall notify the parties when a test case has finally been determined, dismissed or discontinued, After consultation with the parties, the court shall then enter an order providing for a period of time for the removal of an action from the Suspension Disposition Calendar.** [~~The clerk shall notify the parties of the date on which the action will be dismissed for lack of prosecution unless removed from the Suspension Disposition Calendar.~~]

(c) *Removal.* * * *

(d) *Dismissal for Lack of Prosecution.* * * *

(e) *Extension of Time.* For good cause shown why the action was not removed within the period established by the court for the Suspension Disposition Calendar, the court may grant an extension of time for the action to remain on the Suspension Disposition Calendar. A motion for an extension of time shall be made at least 30 days prior to the expiration of the established period.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985**; Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 86

Rule 86 is amended as follows:

RULE 86. [~~JOINED ISSUE CALENDAR~~] **[RESERVED]**

[~~(a) *Joined Issue Calendar.* A Joined Issue Calendar is established on which an unassigned action shall be placed when issue is joined. An action may remain on the Joined Issue Calendar for a 6 month period, the applicable 6 month period shall run from the last day of the month in which the answer was filed until the last day of the 6th month thereafter.~~

~~(b) *Dismissal.* At the expiration of the applicable 6 month period an unassigned action on the Joined Issue Calendar shall be dismissed for lack of prosecution, and the clerk shall enter an order of dismissal without further direction from the court unless a motion is pending.~~

~~(c) *Notice.* At least 30 days prior to the entry of an order of dismissal, the clerk shall send notice to the parties informing them that the action will be dismissed as prescribed by this rule.~~]

(As amended Oct. 3, 1984, eff. Jan. 1, 1985**; Sept. 25, 1992, eff. Jan. 1, 1993.**)

Amendments to Rule 89

Rule 89 is amended as follows:

RULE 89. EFFECTIVE DATE

(a) *Effective Date of Original Rules.* * * *
(b) *Effective Date of Amendments.* * * *
(c) *Effective Date of Amendments.* * * *
(d) *Effective Date of Amendments.* * * *
(e) *Effective Date of Amendments.* * * *
(f) *Effective Date of Amendments.* * * *
(g) *Effective Date of Amendments.* * * *
(h) *Effective Date of Amendments.* * * *
(i) *Effective Date of Amendments.* * * *
(j) *Effective Date of Amendments.* * * *
(k) *Effective Date of Amendments.* * * *

(l) *Effective Date of Amendments.* The amendments adopted by the court on September 25, 1992, shall take effect on January 1, 1993. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Added Oct. 3, 1984, eff. Jan. 1, 1985; and amended, June 19, 1985, eff. Oct. 1, 1985; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; Apr. 28, 1987, eff. June 1, 1987; July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1990, eff. Jan. 1, 1991; Mar. 1, 1991, eff. Mar. 1, 1991; **Sept. 25, 1992, eff. Jan. 1, 1993.**)

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